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No. 05-1575

IN THE
SUPREME COURT OF THE UNITED STATES

DORA B. SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

*Petitioner,*

VS.

JEFFREY TIMOTHY LANDRIGAN, a.k.a.
BILLY PATRICK WAYNE HILL,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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## CAPITAL CASE

## QUESTIONS PRESENTED

Respondent Jeffrey Landrigan actively thwarted his attorney's efforts to develop and present mitigation evidence in his capital sentencing proceeding. Landrigan told the trial judge that he did not want his attorney to present any mitigation evidence, including proposed testimony from witnesses whom his attorney had subpoenaed to testify. On post-conviction review, the state court rejected as frivolous an ineffective assistance of counsel claim in which Landrigan asserted that if counsel had raised the issue of Landrigan's alleged genetic predisposition to violence, he would have cooperated in presenting that type of mitigating evidence.

1. In light of the highly deferential standard of review required in this case pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), did the Ninth Circuit err by holding that the state court unreasonably determined the facts when it found that Landrigan "instructed his attorney not to present any mitigating evidence at the sentencing hearing"?

2. Did the Ninth Circuit err by finding that the state court's analysis of Landrigan's ineffective assistance of counsel claim was objectively unreasonable under *Strickland v. Washington*, 466 U.S. 668 (1984), notwithstanding the absence of any contrary authority from this Court in cases in which (a) the defendant waives presentation of mitigation and impedes counsels attempts to do so, or (b) the evidence the defendant subsequently claims should have been presented is not mitigating?

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## OPINION BELOW

An *en banc* panel of the United States Court of Appeals for the Ninth Circuit held that Landrigan has established a colorable claim of ineffective assistance of counsel entitling him to an evidentiary hearing in district court. *Landrigan v. Schriro*, 441 F.3d 638 (9th Cir. 2006) (Appendix A). *The en banc* ruling reversed a unanimous three-judge Ninth Circuit panel decision that had upheld the district court's judgment denying federal habeas relief. *See Landrigan v. Stewart*, 272 F.3d 1221 (9th Cir. 2001) (panel decision) (Appendix B); *Landrigan v. Stewart*, No. Civ 96-002367-PHX-ROS (D. Ariz. Dec. 15, 1999) (Appendix C). *See also State v. Landrigan*, 859 P.2d 111 (Ariz. 1993).

## STATEMENT OF JURISDICTION

The Ninth Circuit filed its decision on March 8, 2006. This petition for writ of certiorari is timely filed within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of Counsel for his defence.

## STATEMENT OF THE CASE

Respondent Jeffrey Landrigan is on death row in Arizona for a first-degree murder he committed in December of 1989. *See Landrigan*, 859 P.2d at114.

In November of 1989, Landrigan escaped from an Oklahoma Department of Corrections Facility, where he was serving prison terms for a 1982 murder and a 1996 prison stabbing. *Id.*

Soon thereafter, Landrigan arrived in Phoenix, Arizona, where he met the murder victim, a homosexual man who often tried to pick up other men by showing them money. On December 13, 1989, Landrigan went to the victim's apartment, where the two of them drank beer and socialized. The victim, who had picked up his paycheck earlier that day, called a friend to invite him to come over to "party" with "Jeff." *Id.* at 113. The victim called his friend a second time to describe sexual activities he said he was engaging in with Landrigan, and he called a third time to have his friend talk to Landrigan about a possible job. *Id.*

At some point after the phone conversations, Landrigan stabbed the victim and strangled him to death with an electrical cord. Landrigan left the victim's body face down on the bed, with a pool of blood by his head and facial lacerations and puncture wounds on his body. An ace of hearts, from a deck of cards depicting naked men in sexual poses, was carefully propped up on the victim's back, and the rest of the deck was strewn across the bed. The apartment had been ransacked, and the victim's paycheck was missing. *Id.*

When Landrigan was questioned, he denied knowing the victim or having ever been in his apartment. However, he was wearing the victim's shirt when he was arrested, and seven fingerprints taken from the victim's apartment matched Landrigan's. A shoe impression found in spilled sugar at the apartment matched Landrigan's tennis shoes, and blood on Landrigan's shoe matched blood on the victim's shirt. *Id.*

Landrigan had three telephone conversations with his ex-girlfriend in December of 1989. During one of those conversations, Landrigan told her that he was "getting along" in Phoenix by "robbing." Landrigan placed the last call from jail sometime around Christmas and told his ex-girlfriend he had "killed a guy . . . with his hands" about a week earlier. *Id.* at 113-14.

After Landrigan was convicted of murder, burglary and theft, the trial court considered evidence of aggravating and mitigating circumstances. The State established two statutory aggravating circumstances: (1) Landrigan was previously convicted of a felony

involving the use or threat of violence; and (2) the offense was committed for pecuniary gain. *Id.* at 114. Defense counsel presented a sentencing memorandum detailing evidence of Landrigan's long history of drug abuse as mitigation, but Landrigan impeded counsel's efforts to develop other mitigating evidence. (Appendix D, R.T. Oct. 25, 1990, at 7-22.)

Landrigan's counsel subpoenaed two of Landrigan's family members (his mother and his ex-wife) to testify at the sentencing hearing. However, Landrigan instructed them not to cooperate or testify. When counsel attempted to put on the record the type of evidence he had planned to present, Landrigan repeatedly interrupted and undermined every attempt by counsel to portray Landrigan in a more favorable light. (*Id.*) The Ninth Circuit panel decision aptly describes Landrigan's behavior at the sentencing hearing:

> Landrigan was not willing to merely express his opinions to counsel and, once having given those indications about his feelings, recede into comparative silence as counsel went about the business of conducting the proceeding. Quite the contrary; Landrigan took an actively aggressive posture, which ensured that counsel's attempts to place mitigating factors before the sentencing court would come a cropper. Each of counsel's feints in the mitigation direction brought a statement from Landrigan that painted an even bleaker picture and made matters even worse. But we will not merely resort to characterization; we will illustrate the situation with Landrigan's own words.
>
> In an attempt to soften the effect of the fact that Landrigan had previously murdered his best friend, Greg Brown, counsel said that as Landrigan was walking away, Brown, a much larger man, rushed up and attacked him. Landrigan, who happened to be carrying a knife, defended himself and unfortunately

killed Brown. A plausible story, but Landrigan would have none of it. His attorney got it all wrong. Rather, said he, "When we left the trailer, Greg went out of the trailer first. My wife was between us. I pulled my knife out, then I was the one who pushed her aside and jumped him and stabbed him. He didn't grab me. I stabbed him." In other words, Landrigan had come from behind and acted in a murderous way. That was all there was to it.

Landrigan behaved similarly when counsel tried to envelop the assault on another prison inmate in a brume of self defense by suggesting that Landrigan had been threatened by the victim, who was a friend of Greg Brown and Greg's father. Landrigan responded thusly: "That wasn't Greg Brown's dad's friend or nothing like that. It was a guy I got in an argument with. I stabbed him 14 times. It was lucky he lived. But two weeks later they found him hung in his cell." Again, Landrigan had unnecessarily behaved in an extremely violent and murderous way toward another human being.

And when counsel tried to burnish Landrigan's benighted past by indicating that before Brown's murder, Landrigan, for at least one brief shining moment, was a "loving, caring husband," who had married and was taking care of his wife and her child by "working . . . at a golf course during the year-and-a-half" preceding the killing, Landrigan demurred. He explained: "Well, I wasn't just working. I was doing robberies supporting my family. We wasn't married. We wasn't married in Arizona. We lived in Oklahoma. I mean, you, he's not getting the story straight. Why have him tell somebody else's story in the first fucking place?"

If that were not enough, Landrigan made the following presentation when the court asked if he would like to say anything in his own behalf:

> Yeah. I'd like to point out a few things about how I feel about the way this shit, this whole scenario went down. I think that it's pretty fucking ridiculous to let a fagot be the one to determine my fate, about how they come across in his defense, about I was supposedly fucking this dude. This never happened. I think the whole thing stinks. I think if you want to give me the death penalty, just bring it right on. I'm ready for it.

(Appendix B, 272 F.3d at 1226-27.)

The trial court considered the information presented at the sentencing hearing, as well as defense counsel's sentencing memorandum, and the court found as mitigation that Landrigan loved his family and his family loved him, and that the jury did not find premeditation. The court found, however, that the mitigation was insufficient to warrant leniency and imposed a death sentence. The court stated:

> I find the nature of the murder in this case is really not out of the ordinary when one considers first degree murder, but I do find that Mr. Landrigan appears to be somewhat of an exceptional human being. It appears that Mr. Landrigan is a person who has no scruples and no regard for human life and human beings and the right to live and enjoy life to the best of their ability, whatever their chosen lifestyle might be. Mr. Landrigan appears to be an amoral person.

*Landrigan*, 859 P.2d at 117; (*see also* Appendix D, at 33.) The court also imposed a 20-year prison term for the burglary conviction and 6 months in jail for theft. (Appendix D, at 34.)

Landrigan appealed his convictions and sentences to the Arizona Supreme Court. The court denied the appeal and upheld Landrigan's death sentence after independently reviewing the aggravating and mitigating circumstances. *Landrigan*, 859 P.2d at 117; (*see also* Appendix D, at 22.)

In January of 1995, Landrigan filed a petition for post-conviction relief raising, among other claims, an argument that trial counsel was ineffective at sentencing for failing to present mitigating evidence. Landrigan submitted an affidavit stating that if his attorney had discussed with him the theory of a biological component to violence in his family, he would have allowed that type of evidence to be presented. His affidavit did not allege that he would have been willing to permit the presentation of any other type of evidence. (Appendix E, Affidavit dated January 24, 1995.)

The same judge who sentenced Landrigan considered and rejected the post-conviction claim, holding that it was both frivolous and precluded. (Appendix F, Order dated July 17, 1995, at 3-4.) The judge noted that Landrigan had expressly waived presentation of *any* mitigation, and that Landrigan's "statements at sentencing belie his new-found sense of cooperation." *Id.* The judge denied Landrigan's motion for rehearing, and the Arizona Supreme Court denied Landrigan's petition for review from that ruling.

In October of 1996, Landrigan filed a preliminary petition for writ of habeas corpus and application for appointment of counsel, and he filed an amended petition on July 31, 1997. The petition included a claim that counsel was ineffective at sentencing for not presenting evidence regarding a biological component underlying Landrigan's history of violence.

The federal district court rejected Landrigan's ineffective assistance of counsel claim and denied the petition. In rejecting the claim, the court bypassed the deficient performance prong of the *Strickland* analysis[1], and found that Landrigan "failed to demonstrate he was prejudiced by his trial counsel's alleged failure to discover and present mitigation evidence." (Appendix C, at 15-17.) The district court reviewed the mitigation Landrigan claimed should have been presented and concluded that Landrigan failed to demonstrate a reasonable probability that the result of the proceeding would have been different. (*Id.* at 16.) The district court rejected as unnecessary Landrigan's request for an evidentiary hearing and denied the petition. (*Id.* at 33-36.)

Landrigan appealed that ruling to the Ninth Circuit, and a unanimous three-judge panel upheld the district court. (Appendix B, 272 F.3d at 1231.) In upholding the denial of relief on Landrigan's ineffective assistance of counsel claim, the panel noted that, under *Strickland*, the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. (*Id.*, 272 F.3d at 1225-26.) The panel observed that, although there may be close cases in terms of the reasonableness of counsel's actions or inactions in light of the defendant's actions, this was not one of them:

> [O]ur ultimate decision will depend upon the facts and circumstances of the particular case before us. In the constellation of refusals to have mitigating evidence presented, however, this case is surely a bright star. No other case could illuminate the state of the client's mind and the nature of counsel's dilemma quite as brightly as

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[1] Under *Strickland*, a defendant who challenges his counsel's effectiveness at sentencing must demonstrate (1) deficient performance on the part of counsel, *and* (2) resulting prejudice, that is, a reasonable probability that absent counsel's errors, the sentencer would have imposed a different sentence. 466 U.S. at 687

> this one. No flashes of insight could be more fulgurous than those which this record supplies.

(*Id.*, 272 F.3d at 1226.) The panel thus concluded that Landrigan failed to establish a basis for relief:

> When Landrigan was facing the possibility that the death penalty would be imposed upon him for the murder of his victim, he prevented the placement of some mitigating evidence before the sentencing judge. In fact, when counsel attempted to cast Landrigan's past history in a somewhat better light, Landrigan was quick to demolish those attempts and make sure that the court saw his past as drear indeed. He left the Arizona courts with the thought that he was minatory and remorseless. *Landrigan I*, 176 Ariz. at 8, 869 P.2d at 118. He does say that he would have allowed the presentation of genetic predisposition evidence, but it is not reasonably probable that the outcome would have been affected by that evidence. Perhaps Landrigan now regrets his stance, but we do not sit to palliate regrets. We sit to determine whether there has been error of constitutional magnitude. There has not been.

(*Id.*, 272 F.3d at 1231-31.)

The Ninth Circuit agreed to consider the case *en banc*, however, and the panel decision was subsequently withdrawn. *Landrigan v. Stewart*, 397 F.3d 1235 (9th Cir. 2005). An *en banc* majority reversed, holding that Landrigan had alleged a colorable claim for relief, and was entitled to an evidentiary hearing regarding his claim of ineffective assistance of counsel at sentencing. (Appendix A, 441 F.3d at 649.) Two circuit judges dissented, finding that Landrigan failed to allege facts that, if proven, would demonstrate *Strickland* prejudice. The dissenters noted that even the majority opinion acknowledged that "all the mitigating circumstances Landrigan faults counsel for not raising 'converge' to support the suggestion that he suffers from antisocial

personality disorder and cannot control his actions." (*Id.*, 441 F.3d at 651.) The dissenters concluded that because Arizona courts have found that an antisocial personality disorder diagnosis is not compelling mitigation evidence, Landrigan had not alleged facts that if proven would create an objectively reasonable probability that he would have received a different sentence. (*Id.*, 441 F.3d at 651, 653.)

## REASONS WHY THE WRIT SHOULD BE GRANTED

This case provides an extraordinary example of a failure to accord proper deference to factual findings and state court application of this Court's authority in cases decided under the AEDPA's amendments to 28 U.S.C. § 2254. This case also presents a question of great significance nationwide that has not been squarely addressed by this Court regarding the extent of defense counsel's obligation to develop and present mitigation when the defendant actively thwarts counsel's efforts to do so. There is a conflict between the federal circuits in how to address ineffective assistance of counsel claims in cases of this nature.

This Court should reverse the Ninth Circuit's ruling for at least two reasons. First, the Ninth Circuit failed to properly defer to the state court's factual finding that Landrigan "instructed his attorney not to present any evidence at the sentencing hearing." Second, the Ninth Circuit's conclusion that, by denying Landrigan's ineffective assistance of counsel claim, the state courts unreasonably applied this Court's precedent, is unsupportable. There are no cases from this Court that compel the conclusion reached by the Ninth Circuit, and the Ninth Circuit's analysis is in fact inconsistent with this Court's rulings in *Strickland* and *Blystone v. Pennsylvania*, 494 U.S. 299 (1990), and conflicts with rulings from other circuit courts and state courts of last resort. Moreover, the ruling regarding the prejudice prong fails to properly defer under the AEDPA to what is essentially a factual finding by the state courts – in particular the ruling by the original sentencing judge that Landrigan's post-conviction claim was "frivolous."

## I. *The Ninth Circuit Exceeded Its Authority Under The AEDPA When It Rejected The State Courts' Factual Finding That Landrigan Instructed His Defense Attorney Not To Present Any Mitigating Evidence.*

Under 28 U.S.C. § 2254(d), a federal habeas petitioner must demonstrate that the state court's adjudication of the merits resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts. *See Lockyer v. Andrade*, 538 U.S. 63, 70-73 (2003); *Bell v. Cone*, 535 U.S. 685, 693-95 (2002).

In the instant case, the Ninth Circuit ruled that the "state court's finding that [Landrigan] instructed his defense attorney not to present any mitigating evidence was an 'unreasonable determination of the facts.'" (Appendix A, 441 F.3d at 638, 647.) However, that ruling does not withstand scrutiny under any standard of review, much less under the highly deferential standard required by the AEDPA.

The state court record shows that at the sentencing hearing, the trial court engaged in the following colloquy with Landrigan:

> THE COURT: Mr. Landrigan, have you instructed your lawyer that you do not wish for him to bring any mitigating circumstances to my attention?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: Do you know what that means?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: Mr. Landrigan, are there mitigating circumstances I should be aware of?

THE DEFENDANT: Not as far as I'm concerned.

(Appendix A, 441 F.3d at 646; (Appendix D, at 4.)) That colloquy clearly establishes a basis for the state courts' finding that "Landrigan instructed his defense attorney not to present any mitigating evidence."

The Ninth Circuit nevertheless posits that Landrigan's comments were taken out of context, and that the remainder of the transcript compels the conclusion that Landrigan was saying something other than that he wanted to waive presentation of any mitigation and may have wanted only to waive presentation of testimony from family members. (Appendix A, 441 F.3d at 646.) However, far from supporting the Ninth Circuit's conclusion, the context of Landrigan's statements confirms that Landrigan was not cooperating with counsel's attempt to develop mitigation and that he did not want *any* mitigating evidence to be presented.

Landrigan's counsel informed the trial court that he had intended to present as mitigation the testimony of Landrigan's natural mother, Landrigan's ex-wife, and psychiatric experts, but that Landrigan prevented his mother and ex-wife from testifying, and his mother's refusal to cooperate impeded counsel's efforts to present expert testimony:

> MR. FARRELL: Your Honor, at this time—I had, as the Court is aware, already filed a sentencing memorandum concerning a number of mitigating factors for the Court to consider concerning my client before sentencing. I have two witnesses that I wish to testify before this Court, one I had brought in from out of state and is my client's ex-wife, Ms. Sandy Landrigan. The second witness is my client's natural mother, Virginia Gipson. I believe both of those people had some important evidence that I believed the Court should take into mitigation concerning my client. However, Mr.

Landrigan has made it clear to me—Jeffrey, the defendant—that he does not wish anyone from his family to testify on his behalf today.

I have talked with Sandra Landrigan, his ex-wife. I have talked a number of times with her and confirmed what I thought was important evidence that she should present for the Court. And I have also talked with Ms. Gipson, and her evidence I think is very important and should have been brought to this Court's attention. Both of them, after talking with Jeff today, have agreed with their, in one case son and the other ex-husband, they will not testify in his behalf.

THE COURT: Why not?

MR. FARRELL: Basically it's at my client's wishes, Your Honor. I told him that in order to effectively represent him, especially concerning the fact that the state is seeking the death penalty, any and all mitigating factors, I was under a duty to disclose those factors to this Court for consideration regarding the sentencing. He is adamant he does not want any testimony from his family, specifically these two people that I have here, his mother, under subpoena, as well as having flown in his ex-wife.

*I have advised him and I have advised him very strongly that I think it's very much against his interests to take that particular position.* I have also advised both the witnesses I could have them sworn in and ask them questions, but they are under an obligation to do what they feel is right, Your Honor they are looking after Jeff's interest.

I'm coming from the position that I have to bring certain evidence before this Court. I'm at a loss. I don't know what this Court wishes to do.

THE COURT: Mr. Landrigan, *have you instructed your lawyer that you do not wish for him to bring any mitigating circumstances to my attention?*

THE DEFENDANT: *Yeah.*

THE COURT: Do you know what that means?

THE DEFENDANT: Yeah.

THE COURT: Mr. Landrigan, are there mitigating circumstances I should be aware of?

THE DEFENDANT: Not as far as I'm concerned.

THE COURT: I believe we should proceed if the witnesses are willing to testify.

MR. FARRELL: Your Honor, both witnesses have advised me they do not wish to and will not testify. If the court wishes, we can ask each of them.

(Appendix D, at 2-5, emphasis added.)

After both witnesses stated in court that they would honor Landrigan's wishes and refuse to testify, the trial court permitted defense counsel to explain what he believed their testimony would be and how it might relate to proposed expert testimony:

MR. FARRELL: Your honor, I have talked with Ms. Gipson a number of times and she advised me about the factors that I was going to ask her concerning my client would basically—since she didn't raise him, would be the fact during her pregnancy, what if any factors could possibly have affected her pregnancy. And she advises me that she and her husband, Jeffrey's natural father,

were both drug users prior to her pregnancy, she was a drug user during her pregnancy, and I believe she used drugs after her pregnancy. The times and the extent I was going to bring out today, because I believe that there is some evidence that has been presented to the Court in the past concerning the possible effect on an infant when the mother takes drugs and their particular susceptibility to drugs and their antisocial behavior resulting because of their dependency on drugs when they were–during the period of gestation when they were being carried in their mother's body.

And I wish to establish that as a mitigating factor, and if sufficient, *I was going to after getting that testimony, I was considering asking for a recess to determine if I could substantiate the testimony that I had here today from other experts that may be available.* It is a relatively new area that I am not really familiar with. I have talked with some attorneys in the Phoenix area as well as the Tucson area concerning this type of mitigation, concerning the effect on an unborn infant when their mother is dependent on drugs and the resulting effect on the infant, neurological effect as well as any antisocial behavior. I believe there are some qualified experts in the area. *Once I was able to ascertain what particular types of substances Ms. Gipson had been on, the duration, and getting some foundation, I would be able to have those particular experts come in and have the Court consider their testimony in that area.*

THE COURT: Were you going to call any psychological experts such as Dr. Tatro?

MR. FARRELL: That was one name that was brought up, Your Honor. There's also—I have been in contact with—I believe it's Arizona Capital Representation people and they have provided me with a number of other

experts. *But before I could talk with those experts about any specifics, I would have to find out what particular drugs might have been used and how long a period of time.*

THE COURT: Mr. Farrell, my question was not addressed to tying up Ms. Gipson's drug use during pregnancy to the defendant's current psychological condition. My question simply was would you consider — have you considered whether or not a psychological evaluation should be done on your client?

MR. FARRELL: I have considered it, yes.

THE COURT: All right, and have you had sufficient time to have such expert examine your client?

MR. FARRELL: Yes, I have, Your Honor.

THE COURT: And would you have a psychiatrist or psychologist standing in the wings to testify today?

MR. FARRELL: I could have, Your Honor.

THE COURT: Did you choose to, to present mitigating circumstances?

MR. FARRELL: Your Honor, at this time I do not have the information I thought necessary for those experts to testify based on the fact that Ms. Gipson had not presented any specifics for me. And I thought that was really—I understand there may be a problem and if she was not able to testify then I had no specifics for these people.

(Appendix D, at 12–16, emphasis added.)

Landrigan not only objected to testimony from his family members, he objected to counsel's attempt to convey information:

> THE DEFENDANT: Isn't this just hearsay, what is going on here? If I wanted this to be heard, I'd have my wife say it.

(Appendix D, at 7-8.) Thus, the Ninth Circuit's conclusion that Landrigan only objected to testimony from family members is clearly inaccurate; Landrigan's objection obviously applied as well to information presented by his attorney, who was not a member of Landrigan's family. Moreover, Landrigan, who was obviously capable of speaking for himself, did not interject at any point to say, "I only object to testimony from my family members. I do not object to testimony from an expert witness such as described by my attorney." Instead, he made clear he did not want *any* mitigation to be presented.

Furthermore, there is nothing in the record suggesting that the trial court would not have granted the "recess" counsel indicated he would seek if Landrigan agreed to cooperate in developing evidence for consideration by expert witnesses. The trial court evidenced an interest in obtaining as much information as could be made available, and the blame for limiting mitigation lies not with defense counsel or the trial court, but with Landrigan himself.

Finally, in Landrigan's post-conviction affidavit, he avowed only that he would have permitted testimony regarding a biological component to violence in his family. He made no such avowal as to any other type of expert testimony or any other type of mitigating evidence. Thus, the Ninth Circuit's conclusion that Landrigan's express statements to the court waived only testimony from two of his family members is unsupportable. Accordingly, the factual underpinnings of the Ninth Circuit's analysis ruling fails, and the Ninth Circuit exceeded its authority under the AEDPA by failing to defer to the state court's factual finding that Landrigan waived presentation of *any* mitigating evidence.

## II. *The Ninth Circuit Exceeded Its Authority Under The AEDPA When It Found That The State Court's Ruling Was An Unreasonable Application of Clearly Established Federal Law.*

The Ninth Circuit erred by finding that the state courts unreasonably applied *Strickland* because there is no source in this Court's case law for the proposition that the defendant cannot waive the presentation of mitigating evidence. *See Kane v. Espitia*, 126 S. Ct. 407 (2005) (holding that under 28 U.S.C. § 2254(d)(1) clearly established federal law means case law from this Court). The state court's decision is in fact entirely consistent with case law from this Court addressing a defendant's right to waive mitigation and is consistent with this Court's jurisprudence regarding the prejudice prong of the *Strickland* analysis.

The same judge who sentenced Landrigan considered his post-conviction petition and applied *Strickland* in addressing Landrigan's ineffective assistance of counsel claim. (Appendix F, at 3-4.) In rejecting the claim as "frivolous," the court noted that "[s]ince defendant instructed his attorney not to present **any** evidence at the sentencing hearing, it is difficult to comprehend how defendant can claim counsel should have presented other evidence at sentencing." (*Id.* at 3, emphasis in original.) The court further noted that Landrigan's assertion in an affidavit that he would have permitted some type of mitigation to be presented was not credible and was belied by his statements at sentencing. (*Id.* at 4.)

In *Strickland*, this Court held that the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." 466 U.S. at 691. Counsel's conduct must be evaluated in light of "informed strategic choices made by the defendant and on information supplied by the defendant." *Id.*

In the present case, Landrigan's actions and strategic choices undermined counsel's concerted efforts to develop and present mitigation. Landrigan made clear he did not want *any* mitigation

presented. Landrigan not only failed to cooperate with counsel, he actively undermined counsel's attempts to develop and present mitigation. Thus, Landrigan cannot establish either deficient performance or resulting prejudice.

The Ninth Circuit *en banc* opinion cites *Williams v. Taylor*, 529 U.S. 362 (2000), *Rompilla v. Beard*, 125 S. Ct. 2456 (2005), and *Wiggins v. Smith*, 539 U.S. 510 (2003), in concluding that the state court opinion was contrary to or involved an unreasonable application of clearly established federal law. (Appendix A, 441 F.3d at 642-43.) However, *none* of those cases involve a situation in which the defendant affirmatively represented to the trial court that he did not want any mitigation to be presented and actively undermined any effort by counsel to present mitigation. Accordingly, the instant case cannot be said to be contrary to clearly established federal law.

The Constitution does not prohibit a defendant in a capital case from waiving presentation of mitigation evidence. *See Blystone*, 494 U.S. at 306 n.4 (affirming death sentence where "[a]fter receiving repeated warnings from the trial judge, and contrary advice from his counsel, petitioner decided not to present any . . . mitigating evidence."). Thus, the state court's ruling that Landrigan's express waiver of presentation of mitigation renders his ineffective assistance claim "frivolous" is consistent with federal law, as set forth in *Strickland* and *Blystone*. Accordingly, the state courts' denial of Landrigan's claim was not an unreasonable application of clearly established law from this Court.

The approach taken by the *en banc* court in this case conflicts with that in other circuits. For example, in *Wallace v. Ward*, 191 F.3d 1235 (10th Cir. 1999), the Tenth Circuit rejected a similar claim that counsel did not provide effective representation in a situation in which the defendant waived his right to present mitigation evidence. The Tenth Circuit noted that the defendant "refused to cooperate with his attorney in the presentation of mitigating evidence; indeed [the defendant] would not even let his attorney cross-examine prosecution witnesses during the sentencing hearing. In rejecting the defendant's

claim of ineffective assistance based on an allegation that counsel allegedly conducted no investigation, the Tenth Circuit quoted this Court's statement in *Strickland* that "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements and actions." 191 F.3d at 1247. The court concluded that counsel's decision not to investigate or present mitigating evidence was completely determined by the defendant and was within the realm of reasonable tactical decisions. *Id.* at 1248. The court further concluded that the defendant had not shown prejudice because he was actively seeking the death penalty. Thus, counsel's alleged deficiencies did not affect the sentence. *Id.*

In *Mitchell v. Kemp*, 762 F.2d 886, 889 (11th Cir. 1985), the Eleventh Circuit similarly rejected a claim of ineffective assistance of counsel based on the defendant's conduct, holding that "[w]hen a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made."

The Ninth Circuit's ruling in the instant case cannot be squared with these decisions from the Tenth and Eleventh Circuits. This Court should grant certiorari review to settle this conflict.

Furthermore, the Ninth Circuit's ruling regarding prejudice fails to defer to what is essentially a factual finding by the state court. The state court found that Landrigan's assertion that his counsel was ineffective for failing to present evidence of a genetic predisposition to violence to be "frivolous." The judge considering this post-conviction claim was the same judge who sentenced Landrigan. Thus, there is no need to speculate about whether the information Landrigan claims should have been presented would have changed the outcome of his sentencing proceeding. The state court's ruling regarding the post-conviction claim is essentially a factual finding entitled to deference, particularly under the AEDPA standard of review.

Finally, even assuming the state court's ruling regarding whether Landrigan was prejudiced by counsel's alleged failure to present evidence of a predisposition to violence is not a factual finding,

and is instead strictly a legal conclusion, the state court's ruling was not objectively unreasonable because the evidence at issue would not have been presented because of Landrigan's unwillingness to present mitigation and because it is only marginally—if at all—mitigating.

The three-judge panel that upheld the district court ruling concluded that Landrigan's tenuous theory that his biological background made him what he is would not have affected the trial judge at sentencing:

> It is highly doubtful that the sentencing court would have been moved by information that Landrigan was a remorseless, violent killer because he was genetically programmed to be violent, as shown by the fact that he comes from a family of violent people, who are killers also.

(Appendix B, 272 F.3d at 1228-29.) The panel noted that this type of information would have shown the court that Landrigan would continue to be violent:

> He had already done that to a fare-thee-well. The prospect was chilling; before he was 30 years of age, Landrigan had murdered one man, repeatedly stabbed another one, escaped from prison, and within two months murdered still another man. As the Arizona Supreme Court so aptly put it when dealing with one of Landrigan's other claims, "[i]n his comments, defendant not only failed to show remorse or offer mitigating evidence, but he flaunted his menacing behavior." *Landrigan I*, 176 Ariz. at 8, 859 P.2d at 118. On this record, assuring the court that genetics made him the way he is could not have been very helpful. There was no prejudice.

(*Id.* at 1229).

The two circuit judges who dissented from the *en banc* ruling agreed with the panel and further noted that, under Arizona law, an antisocial personality disorder diagnosis "has often been treated on appeal as insufficient to justify mitigation," particularly when the defendant is able to control his conduct in other settings. (Appendix B, 441 F.3d at 651) (citing *State v. Brewer*, 826 P.2d 783, 802-03 (1992)). The two dissenting *en banc* judges observed that in the instant case, Landrigan was able to control his impulses long enough to cultivate the victim's trust and attempt to profit from their encounter. Thus, an anti-social personality disorder would not be mitigating in this case. *Id.*

The Arizona Supreme Court has repeatedly held that a personality disorder, standing alone, is not entitled to any mitigating weight. *See e.g. State v. Jones*, 4 P.3d 345, 367 (Ariz. 2000); *State v. Gerlaugh*, 698 P.2d 694, 704 (Ariz. 1985). Only if there is "some reason other than the nature of the disorder" will an antisocial personality disorder be entitled to any mitigating weight. *Gerlaugh*, 698 P.2d at 704. Evidence that Landrigan is a violent unrehabilitative sociopath was clearly established by Landrigan's criminal history and by his statements at the time of sentencing. Additional evidence to that effect would not have aided Landrigan's case, and he has not established even a remote possibility that this evidence would have changed the outcome of his sentencing proceeding. Thus, the state court's ruling denying Landrigan's claim was not unreasonable.

Failure to accord deference on federal review to state court rulings regarding the application of *Strickland* undermines the states' interest in the finality of their judgments in criminal cases. The Ninth Circuit's recent record in addressing *Strickland* claims demonstrates why public confidence in the criminal justice system is undermined when federal courts do not accord deference to state court rulings. Since 1998, the Ninth Circuit has granted habeas relief in six Arizona capital cases on the basis of ineffective assistance of counsel at sentencing. *See Lambright v. Stewart*, 241 F.3d 1201 (9th Cir. 2001) (remanded for evidentiary hearing); *Smith (Joe Clarence) v. Stewart*, 189 F.3d 1004 (9th Cir. 1999) (remanded for new sentencing); *Wallace v. Stewart*, 184 F.3d 112 (9th Cir. 1999) (remanded for new sentencing);

*Smith (Bernard) v. Stewart*, 140 F.3d 1263 (9th Cir. 1998) (remanded for new sentencing); *Correll v. Stewart*, 137 F.3d 1404 (9th Cir. 1998) (remanded for an evidentiary hearing); *Summerlin v. Schriro*, 427 F.3d 623 (2005) (remanded for new sentencing).

Proceedings subsequent to the Ninth Circuit's reversals in five of those cases have resulted in rulings upholding the death sentence following an evidentiary hearing or resentencings where death has again been imposed.[2] In the sixth case (Summerlin), the defendant is awaiting resentencing. Thus, the Ninth Circuit's reversals have served only to delay finality.

If left unchanged, the Ninth Circuit's ruling in this case will similarly delay finality and exact an unwarranted toll on victims and the criminal justice system. The Ninth Circuit's ruling should be reversed.

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[2] In August 2004, following an evidentiary hearing in district court, the court denied Lambright's ineffective assistance of sentencing counsel claim. (Dkt.325; https://ecf.azd.uscourts.gov/cgi-bin/DktRpt.pl?123647959341114-L_280_0-1). Lambright was originally sentenced to death in May 1982.

In June 2004, a jury re-imposed Joe Clarence Smith's two death sentences. http://www.superiorcourt.maricopa.gov/docket/criminal/caseInfo.asp (CR0000095116). Smith was originally sentenced to death in August 1977 for both murders, an 18-year old girl murdered in December 1975 and a 14-year-old girl murdered in January 1976.

In April 2005, a jury re-imposed Wallace's three death sentences. http://www.cosc.co.pima.az.us/courtpartners/start.asp. (CR-12590). Wallace was originally sentenced in May 1985, following his guilty plea to murdering two children and their mother.

In March 2003, following an evidentiary hearing, the district court denied Correll's ineffective assistance of sentencing counsel claim. (Dkt. 439; https://ecf.azd.uscourts.gov/cgi-bin/DktRpt.pl?111478375068962-L_280_0-1. Correll was originally sentenced to death for the triple murders in November 1984.

## CONCLUSION

This case is an extreme example of the Ninth Circuit's failure to accord deference to factual findings by a state court. If the Ninth Circuit's ruling is not reversed, the deference standard required under the AEDPA is essentially meaningless. No amount of mental gymnastics can change the fact that Landrigan told the state court he did not want his attorney to present any mitigating evidence. The Ninth Circuit's ruling to the contrary is unsupportable.

The state court's rejection of Landrigan's ineffective assistance of counsel claim was not an unreasonable application of this Court's *Strickland* jurisprudence. No clearly-established law from this court compels relief. Counsel was not deficient because Landrigan waived mitigation and prevented counsel from presenting mitigating evidence. Landrigan has not established prejudice under *Strickland* because he waived mitigation and there is not even a remote possibility that his sentence would have been different had counsel presented evidence of a genetic component underlying violence in his family. The evidence Landrigan now proffers simply confirms that he is a sociopath. The same state court judge who sentenced Landrigan addressed and rejected Landrigan's ineffective assistance of counsel claim, finding it frivolous in light of Landrigan's express waiver of all mitigation at the time of sentencing. That ruling is entitled to deference under the AEDPA as a factual determination and as a reasonable application of clearly established federal law as determined by this Court. This Court should grant certiorari and reverse the decision of the Ninth Circuit.

Respectfully submitted

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**APPENDIX A**

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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|---|---|
| JEFFREY TIMOTHY LANDRIGAN, a.k.a. Billy Patrick Wayne Hill,<br><br>*Petitioner-Appellant,*<br><br>v.<br><br>DORA B. SCHRIRO, Director, Arizona Department of Corrections,<br><br>*Respondent-Appellee.* | No. 00-99011<br><br>D.C. No. CV-96-02367-PHX-ROS<br><br>OPINION |

Appeal from the United States District Court

for the District of Arizona

Roslyn O. Silver, District Judge, Presiding

Argued and Submitted En Banc

March 24, 2005–San Francisco, California

Submission Withdrawn April 15, 2005

Resubmitted March 1, 2006

Filed March 8, 2006

Before: Mary M. Schroeder, Chief Judge, Harry Pregerson, Stephen Reinhardt, Alex Kozinski, Michael Daly Hawkins, Kim McLane Wardlaw, William A. Fletcher, Marsha S. Berzon, Richard R. Clifton, Consuelo M. Callahan and Carlos T. Bea, Circuit Judges.

Opinion by Judge Hawkins;

Dissent by Judge Bea

## SUMMARY

### Criminal Law and Procedure/Right to Counsel

The court of appeals affirmed a judgment of the district court in part, reversed in part, and remanded. The court held that a defendant raised a colorable claim that his counsel's performance fell below the objective standard of reasonableness in the penalty phase of his capital murder trial where, despite clues that the defendant began drinking at an early age because his adoptive mother was an alcoholic, that his birth father was on death row, and that he needed help mentally like his father did, counsel did not contact the defendant's birth father, secure a detailed mental health evaluation, or develop a family or social history regarding the defendant's upbringing.

Appellant Jeffrey Landrigan was convicted of first degree murder in Arizona state court and sentenced to death. The Arizona Supreme Court affirmed his conviction and sentence, after which Landrigan petitioned for post-conviction relief in the Arizona Superior Court, urging that his counsel, Dennis Farrell, had been ineffective by failing to investigate and present mitigating evidence at the sentencing proceeding. Landrigan also requested an evidentiary hearing in connection with this claim. Farrell had lined up only two witnesses to testify on his behalf during the sentencing phase: Landrigan's ex-wife and birth mother. Landrigan, however, opposed putting them on the stand. After asking whether Landrigan had instructed his attorney not to present mitigating circumstances, the trial court had asked only, "Do

you know what that means?" Landrigan simply responded, "Yeah." The superior court denied the request for the hearing and the petition, concluding that Landrigan could not argue his counsel was ineffective at sentencing because he had instructed his attorney not to present mitigating evidence. The Arizona Supreme Court summarily denied the petition.

Landrigan petitioned for writ of habeas corpus in federal district court raising a number of claims, including ineffective assistance of counsel. Landrigan alleged that his birth mother sent a letter to Farrell in 1990, informing Farrell that, among other things, Landrigan began drinking at an early age because his adoptive mother was an alcoholic; Landrigan's father was on death row in Arkansas during the time of Landrigan's trial; and Landrigan needed help mentally like his father did. Landrigan sought to expand the record to include declarations by mental health experts and persons familiar with Landrigan's background, and the district court granted this request in part. Landrigan also sought an evidentiary hearing, but the district court denied this request and also denied the petition on the merits. The district court concluded that even if Landrigan's counsel was deficient, Landrigan had not demonstrated he suffered prejudice from his counsel's shortcomings.

Landrigan appealed. A three-judge panel of the court of appeals affirmed the district court's denial of the writ. The court of appeals later granted rehearing en banc.

[1] Under the Antiterrorism and Effective Death Penalty Act (AEDPA), if a petitioner fails to develop in state court the factual basis for a claim, he is restricted in his ability to do so in federal court. These restrictions do not apply, however, if a petitioner exercised due diligence in state court and attempted to develop the factual basis of his claim. [2] Landrigan did not "fail to develop" the factual basis for his ineffective assistance claim in state court. [3] Landrigan tried and failed, through no fault of his own, to develop the facts supporting his ineffective assistance claim at the state-court level. He was therefore

not precluded by AEDPA from seeking an evidentiary hearing in federal court.

**[4]** The Sixth Amendment right to effective assistance of counsel extends to the sentencing phase of a capital case. **[5]** According to the prevailing standards at the time of Landrigan's sentencing, counsel had an obligation to conduct a thorough investigation of the defendant's background.

**[6]** Counsel is not deficient for failing to find mitigating evidence if, after a reasonable investigation, nothing has put the counsel on notice of the existence of that evidence. In Landrigan's case, however, the initial investigation did reveal potential mitigating evidence, but that evidence was not developed. Despite these clues, Farrell did not contact Landrigan's birth father, secure a detailed mental health evaluation, or develop a family or social history regarding Landrigan's upbringing in his adoptive home. [7] A comparison of the results of the minimal investigation by Farrell with the amount of available mitigating evidence Landrigan claimed was available left the court of appeals with grave doubts whether Landrigan received effective assistance of counsel during his penalty phase proceeding.

**[8]** Although Landrigan was unwilling to have his ex-wife and birth mother testify, there was no mention of any other witnesses, and there was no indication that Landrigan would have precluded the introduction of mitigating evidence by other means. [9] The state court's finding that Landrigan instructed his attorney not to present any evidence at the sentencing hearing was not supported by the record and thus amounted to an unreasonable determination of the facts.

**[10]** There was no indication in the record that Landrigan in any way prohibited or impeded Farrell's ability to investigate or assemble a mitigation defense. [11] Nor did the record indicate that Landrigan's decision was informed and knowing. The trial court's cursory inquiry into Landrigan's purported waiver of all mitigating evidence did not satisfy the required standard. [12] Landrigan did not waive the right to

assert a claim for ineffective assistance of counsel.

[13] There was a significant amount of potential mitigating evidence that was not unearthed or presented to the sentencing judge. [14] If true, Landrigan's allegations were the very sort of mitigating evidence that might well have influenced the judge's appraisal of Landrigan's moral culpability. [15] Presented with the additional mitigating evidence regarding Landrigan's background and emotional and mental problems, there was a reasonable probability that, if Landrigan's allegations were true, the sentencing judge would have reached a different conclusion. [16] It had to be concluded that Landrigan alleged facts that, if demonstrated to be true, presented a colorable claim that he received ineffective assistance of counsel in his capital sentencing proceeding. Landrigan demonstrated a proper basis for an evidentiary hearing.

Judge Bea dissented, writing that the case should not be remanded case for an evidentiary hearing because Landrigan failed to allege facts that, if proven, would demonstrate prejudice.

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## COUNSEL

Dale A. Baich, Assistant Federal Public Defender, Phoenix, Arizona, for the petitioner-appellant.

James P. Beene, Assistant Attorney General, Capital Litigation Section, Phoenix, Arizona, for the respondent-appellee.

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## OPINION

HAWKINS, Circuit Judge:

In this appeal, we consider whether petitioner, Jeffrey Timothy Landrigan, received ineffective assistance of counsel in the penalty phase of his capital murder trial. We conclude Landrigan has raised a

colorable claim that his counsel's performance fell below the objective standard of reasonableness required by *Strickland v. Washington*, 466 U.S. 668 (1984), and that he was prejudiced by these errors. We therefore remand to the district court to conduct an evidentiary hearing on Landrigan's claim.

## BACKGROUND

In 1989, Landrigan escaped from an Oklahoma prison and soon thereafter murdered Chester Dean Dyer in Arizona. He was convicted of first degree murder in Arizona state court and sentenced to death. The Arizona Supreme Court affirmed his conviction and sentence. *Arizona v. Landrigan*, 176 Ariz. 1, 8 (1993).[1]

Landrigan filed a petition for post-conviction relief in the Arizona Superior Court, urging that his counsel, Dennis Farrell, had been ineffective by failing to investigate and present mitigating evidence at the sentencing proceeding. Landrigan also requested an evidentiary hearing in connection with this claim. The Superior Court denied the request for the hearing and the petition, concluding that Landrigan could not argue his counsel was ineffective at sentencing because he had instructed his attorney not to present mitigating evidence. The Arizona Supreme Court summarily denied the petition.

Landrigan thereafter filed a petition for writ of habeas corpus in federal district court raising a number of claims, including ineffective assistance of counsel. Landrigan sought to expand the record to include declarations by mental health experts and persons familiar with Landrigan's background, and the district court granted this request in part. Landrigan also sought an evidentiary hearing, but the district court denied this request and also denied the petition on the merits. The district court concluded that even if Landrigan's counsel was deficient, Landrigan had not demonstrated he suffered prejudice from his

[1] For a more detailed description of the crime and state court proceedings, *see Landrigan*, 176 Ariz. at 3-4.

counsel's shortcomings.

Landrigan appealed to this court. The district court granted Landrigan a certificate of appealability on several claims, including whether "Landrigan's trial counsel was ineffective at sentencing, depriving Landrigan of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments." A three-judge panel affirmed the district court's denial of the writ. *Landrigan v. Stewart*, 272 F.3d 1221, 1223 (9th Cir. 2001). We granted rehearing en banc. *Landrigan v. Stewart*, 397 F.3d 1235 (9th Cir. 2005).[2]

Since the district court's 1999 denial of the writ and Landrigan's request for an evidentiary hearing and the filing of our now withdrawn panel opinion on November 28, 2001, the Supreme Court has issued a number of significant decisions regarding ineffective assistance of counsel claims. The Court has clarified the duty of an attorney to develop and present mitigating evidence, even when dealing with capital defendants who are "uninterested in helping" or "even actively obstructive" in developing a mitigation case, *Rompilla v. Beard*, 125 S. Ct. 2456, 2462-63 (2005), and also has elaborated on the appropriate measure of prejudice in a capital penalty phase proceeding, *see Wiggins v. Smith*, 539 U.S. 510, 534-38 (2003). Viewing Landrigan's claim in light of these precedents, we find that Landrigan has made a colorable claim that he did not receive effective assistance of counsel in his sentencing. We therefore remand to the district court to conduct an evidentiary hearing.

## I.

We review the district court's decision to deny habeas corpus relief de novo. *Bribiesca v. Galaza*, 215 F.3d 1015, 1018 (9th Cir.

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[2] We initially heard argument in March 2005, but deferred submission pending this court's en banc decision in *Summerlin v. Schriro*, 427 F.3d 623 (9th Cir. 2005) (en banc).

2000). Because Landrigan filed his petition after April 24, 1996, it is governed by the standard of review set forth in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d)(1). Under AEDPA, Landrigan is entitled to a writ if the state court's denial of his claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Id.*

[1] The district court's decision to deny an evidentiary hearing is reviewed for an abuse of discretion. See *Earp v. Ornoski*, 431 F.3d 1158, 1166 (9th Cir. 2005). Under AEDPA, if a petitioner fails to develop in state court the factual basis for a claim, he is restricted in his ability to do so in federal court. *See* 28 U.S.C. § 2254(e)(2). These restrictions do not apply, however, if a petitioner exercised due diligence in state court and attempted to develop the factual basis of his claim. As the Supreme Court has explained, "a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Michael Wayne Williams v. Taylor*, 529 U.S. 420, 432 (2000). The Court has further noted that "[d]iligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Id.* at 437.

[2] Landrigan did not "fail to develop" the factual basis for his ineffective assistance claim in state court. In his state habeas petition, Landrigan made a general claim that his counsel had failed to investigate and develop potential mitigating evidence, including his biological mother's use of drugs and alcohol during gestation, his adoptive mother's alcoholism and its adverse effect on Landrigan's upbringing, and information regarding his biological father and his family history of violence. Landrigan sought the appointment of a medical expert to assist in establishing mitigating evidence regarding the effects of drug and alcohol use on a developing fetus and also requested an evidentiary hearing on his ineffective assistance claim. Landrigan supported his petition with various declarations by available witnesses who attested they were never contacted by Landrigan's trial

attorney, and with documentary evidence regarding criminal psychobiology and congenital determinants of violence. The state court denied both the appointment of an expert and Landrigan's request for an evidentiary hearing.

[3] Landrigan tried and failed, through no fault of his own, to develop the facts supporting his ineffective assistance claim at the state-court level. He is therefore not precluded by AEDPA from seeking an evidentiary hearing in federal court. *See Earp*, 431 F.3d at 1169; *Jones v. Wood*, 114 F.3d 1002, 1013 (9th Cir. 1997). In such circumstances, Landrigan is entitled to an evidentiary hearing if he can establish a "colorable claim" for relief. *See Earp*, 431 F.3d at 1173.

## II.

[4] The Sixth Amendment right to effective assistance of counsel extends to the sentencing phase of a capital case. *Silva v. Woodford*, 279 F.3d 825, 836 (9th Cir. 2002). We analyze Landrigan's claim that he was deprived of this right pursuant to the standards set forth by the Supreme Court in *Strickland*: Landrigan must demonstrate that his counsel's representation "fell below an objective standard of reasonableness" and that there is a reasonable probability that counsel's unprofessional errors "undermine confidence in the outcome of the proceeding." 466 U.S. at 688, 694.

### A.

[5] According to the prevailing standards at the time of Landrigan's sentencing, counsel had an obligation to conduct a thorough investigation of the defendant's background. *See Terry Williams v. Taylor*, 529 U.S. 362, 396 (2000) ("*T. Williams*") (citing 1 ABA Standards for Criminal Justice 4-4.1, cmt. at p. 4-55 (2d ed. 1980)); *Rompilla*, 125 S. Ct. at 2466. As this court has also noted, when it comes to the penalty phase of a capital trial, "[i]t is imperative that all relevant mitigating information be unearthed for consideration." *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1999). We begin by considering what steps Landrigan's counsel took in his investigation.

*See Wiggins*, 539 U.S. at 522-23 (court should first focus on whether the investigation is itself reasonable); *Strickland*, 466 U.S. at 690-91 (courts will defer to counsel's choices, if made after conducting a reasonable investigation).

1. On the record before us, it appears that Landrigan's counsel did little to prepare for the sentencing aspect of the case. He did obtain several medical documents indicating Landrigan had a long history of substance abuse and included this information in Defendant's Sentencing Memorandum Concerning Mitigation. He also had a psychologist, Mickey McMahon, evaluate Landrigan to obtain an "initial impression," but did not provide him with any relevant background information on Landrigan to assist in the evaluation. *See, e.g., Clabourne v. Lewis*, 64 F.3d 1373, 1385 (9th Cir. 1995) (counsel ineffective for inadequately preparing psychologist). Although the psychologist recommended that he perform additional testing, Farrell would not authorize any follow-up tests. Dr. McMahon's declaration describes his experience with Farrell as "quite different from the working relationship I had with counsel in other death penalty cases."

Landrigan's counsel also hired an investigator, who spent a total of thirteen hours on the case, but none of this work was directed towards sentencing phase considerations. The investigator claims that he had very little interaction with counsel about the case and that he found this "quite frustrating."

Prior to the sentencing, Farrell also spoke briefly with two family members — Landrigan's ex-wife and his birth mother. At the sentencing hearing, Farrell advised the court that he expected Landrigan's ex-wife to verify Landrigan's history of substance abuse; state that Landrigan had been a loving, caring husband; and explain the circumstances of one of Landrigan's prior convictions. Farrell also proffered that Landrigan's birth mother would testify about her drug and alcohol use during her pregnancy, and that after developing this testimony, Farrell was then hoping to have a recess to talk to some experts about the effect on the fetus. But even this dialogue with the

court revealed that he had not, during pre-sentencing investigation, ascertained any specifics about Landrigan's mother's drug use or contacted any experts on the subject in advance of the hearing.

**[6]** "[C]ounsel is not deficient for failing to find mitigating evidence if, after a reasonable investigation, nothing has put the counsel on notice of the existence of that evidence." *Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1998) (quoting *Matthews v. Evatt*, 105 F.3d 907 (4th Cir. 1997)) (internal quotation marks omitted). In this case, however, the initial investigation *did* reveal potential mitigating evidence, but that evidence was not developed. In addition to the evidence discussed above, Landrigan alleges that his birth mother sent a letter to Farrell in April 1990, informing Farrell that, among other things, (1) Landrigan began drinking at an early age because his adoptive mother was an alcoholic and would walk around nude in front of him, (2) Landrigan's father was on death row in Arkansas and the "blood link to Darrel [and] I are what has messed up his whole life," and (3) "Jeff needs help mentally like his father did." Despite these clues, Farrell did not contact Landrigan's birth father, secure a detailed mental health evaluation, or develop a family or social history regarding Landrigan's upbringing in his adoptive home.

Landrigan alleges that with some minimal investigation, Farrell could have uncovered Landrigan's tortured family history: Landrigan's birth parents were troubled individuals who abused drugs and alcohol; Landrigan's biological father was a violent man who, at the time of Landrigan's trial, was on death row in Arkansas; Landrigan's mother abandoned Landrigan when he was six months old, leaving him in a day nursery and never returning; Landrigan was later adopted, but unfortunately, his adoptive mother was also an alcoholic, at times consuming a fifth of vodka or more a day until she passed out; she would frequently slap him and once even hit him with a frying pan; his childhood was difficult — he exhibited abandonment and attachment problems, had difficulty sleeping, and had violent temper tantrums even at a very early age; Landrigan had serious drug and alcohol problems while very young, and he even overdosed in class in eighth or ninth

grade; at the time he committed the murder in Arizona, had had used amphetamines for forty-two straight days and had slept on only about fourteen of those days.

In 1998, following a thorough neuropsychological evaluation, Dr. Thomas Thompson reported that the convergence of the above-mentioned factors — Landrigan's genetic makeup, *in utero* exposure to teratogenic substances, early maternal rejection, and his troubled interactions with his adoptive family — resulted in disordered behavior that was "beyond the control of Mr. Landrigan," and left him unable to "function in a society that expects individuals to operate in an organized and adaptive manner, taking into account the actions and consequences of their behavior and their impact on society and its individual members."

[7] **2.** A comparison of the results of the minimal investigation by Farrell with the amount of available mitigating evidence Landrigan claims was available leaves us with grave doubts whether Landrigan received effective assistance of counsel during his penalty phase proceeding. The state urges, however, that Farrell's investigatory shortcomings are irrelevant because Landrigan would not permit the introduction of mitigating evidence in the sentencing phase of his trial.

The state misreads what occurred at the sentencing hearing. Landrigan's counsel had lined up only two witnesses to testify on his behalf during the sentencing phase: Landrigan's ex-wife and birth mother. Landrigan, however, opposed putting them on the stand. His lawyer explained Landrigan's wishes to the sentencing judge as follows:

> MR. FARRELL: Your Honor, at this time . . . I have two witnesses that I wished to testify before this Court, one I had brought in from out of state and is my client's ex-wife, Ms. Sandy Landrigan. The second witness is my client's natural mother, Virginia Gipson. I believe both of those people had some important

evidence that I believed the Court should take into mitigation concerning my client. However, Mr. Landrigan has made it clear to me—Jeffrey, the defendant—that he does not wish anyone from his family to testify on his behalf today.

I have talked with Sandra Landrigan, his ex-wife. I have talked a number of times with her and confirmed what I thought was important evidence that she should present for the Court. And I have also talked with Ms. Gipson, and her evidence I think is very important and should have been brought to this Court's attention. Both of them, after talking with Jeff today, have agreed with their, in one case son and the other ex-husband, they will not testify in his behalf.

THE COURT: Why not?

MR. FARRELL: Basically it's at my client's wishes, Your Honor. I told him that in order to effectively represent him, especially concerning the fact that the State is seeking the death penalty, any and all mitigating factors, I was under a duty to disclose those factors to this Court for consideration regarding the sentencing. *He is adamant he does not want any testimony from his family, specifically these two people that I have here, his mother, under subpoena, and as well as having flown in his ex-wife.*

I have advised him and I have advised him very strongly that I think it's very much against his interests to take that particular position. I have also advised both the witnesses I could have them sworn in and ask them questions, but they are under an obligation to do what they feel is right, Your Honor. They are looking after Jeff's interests.

> I'm coming from the position that I have to bring certain evidence before this Court. I'm at a loss. I don't know what this Court wishes to do.

[Emphasis added.]

**[8]** The state trial court was thus confronted with a situation where the defense lawyer had only prepared to present two mitigation witnesses—Landrigan's ex-wife and birth mother—and Landrigan objected to putting them on the stand. It is clear from this statement by counsel that Landrigan was unwilling to have these two particular people testify, but there is no mention of any other witnesses, and there is no indication that Landrigan would have precluded the introduction of mitigating evidence by other means.[3] The possibility of other evidence or witnesses simply never came up, doubtless because defense counsel had no other evidence to present.

The colloquy that followed between the sentencing judge and Landrigan must be read against this backdrop:

> THE COURT: Mr. Landrigan, have you instructed your lawyer that you do not wish for him to bring any mitigating circumstances to my attention?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: Do you know what that means?
>
> THE DEFENDANT: Yeah.

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[3] *See Summerlin*, 427 F.3d at 637-39 (spontaneous objection to presentation of one witness does not excuse failure to present penalty phase defense); *Stankewitz v. Woodford*, 365 F.3d 706, 721-22 (9th Cir. 2004) (opposition to calling family members or experts as witnesses does not excuse an attorney from interviewing experts and family members to obtain mitigating evidence.

THE COURT: Mr. Landrigan, are there mitigating circumstances I should be aware of?

THE DEFENDANT: Not as far as I'm concerned.

At the time the sentencing judge asked Landrigan whether he instructed his lawyer not to present any mitigating circumstances, the only mitigating evidence that the lawyer *could* have brought to the court's attention was the testimony of the two witnesses. Landrigan's response to the court's rather vague question cannot, in context, be construed as anything more than confirmation that he did not want his birth mother and ex-wife testifying on his behalf. Indeed, due to his lawyer's meager investigation, there was no other mitigating evidence available to which Landrigan could object or not object.

When the sentencing judge then asked Landrigan whether there were any *other* mitigating circumstances to be taken into account, Landrigan replied that there were not. This, of course, was a direct consequence of the fact that his counsel had not presented him with any options other than the two witnesses he opposed. Had his lawyer conducted an investigation and uncovered other types of mitigating evidence, Landrigan might well have been able to direct the court to other mitigating circumstances. Viewing the entire colloquy in proper context, it is clear that the sentencing judge was only inquiring about Landrigan's willingness to allow his birth mother and ex-wife to testify, and that Landrigan simply confirmed that he was not.

**[9]** It was not until the Arizona Supreme Court (on direct appeal) and the Arizona Superior Court (on habeas review) examined the colloquy that the sentencing judge's questioning was taken out of context. The state supreme court found that, "[a]t the sentencing hearing, defendant instructed his lawyer not to present any mitigating evidence." And the state habeas court similarly found that Landrigan "instructed his attorney not to present any evidence at the sentencing

hearing." In light of what actually transpired at the sentencing hearing, such an overly broad characterization of the colloquy is not supported by the record and thus amounts to an "unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2).

**[10] 3.** Even were we to overlook the state habeas court's flawed factual finding that Landrigan unequivocally waived presentation of all mitigating evidence, the court's conclusion that Landrigan's claim was therefore necessarily "frivolous" and "meritless" was an unreasonable application of United States Supreme Court precedent. *See id.* § 2254(d)(1). Landrigan's apparently last-minute decision cannot excuse his counsel's failure to conduct an adequate investigation *prior* to the sentencing. *Cf. Wiggins*, 539 U.S. at 522-23 (focus should be on whether investigation was itself reasonable, not whether counsel should have presented a mitigation case);[4] *see also Stankewitz*, 365 F.3d at 722 (counsel has duty to investigate what evidence potentially could have been presented and discuss this evidence with accused in order to obtain an informed and knowing waiver); *Silva*, 279 F.3d at 839-40 (instruction not to call parents as witnesses did not preclude counsel from investigating background). There is no indication in the current record that Landrigan in any way prohibited or impeded Farrell's ability to investigate or assemble a mitigation defense. And even if he had, the prevailing standards, even at the time of Landrigan's trial, "suggest that a lawyer's duty to investigate is virtually absolute, regardless of a client's expressed wishes." *Silva*, 279 F.3d at 840 (citing 1 ABA Standards for Criminal Justice 4-4.1 cmt. at 4-55); *see also T. Williams*, 529 U.S. at 396 (citing same).

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[4] Although *Wiggins* is a recent Supreme Court case, it applied the familiar *Strickland* inquiry applicable to ineffective assistance claims in a post-AEDPA case. Indeed, the Court in *Wiggins* expressly stated that the case presented the same issue as in *Strickland* and that it was applying the "clearly established precedent of *Strickland*." 539 U.S. at 521. Wiggins's trial took place in 1989, one year prior to Landrigan's 1990 trial. *Id.* at 514-15. Therefore, the Court's reasoning in *Wiggins* is fully applicable to Landrigan's case.

**[11]** Nor does the record indicate that Landrigan's decision was informed and knowing. It is "difficult for an attorney to advise a client of the prospects of success or the potential consequences of failing to present mitigating evidence when the attorney does not know that such evidence exists." *Douglas v. Woodford*, 316 F.3d 1079, 1089 (9th Cir. 2003); *see also Stankewitz*, 365 F.3d at 722 (petitioner's objection to mitigating evidence apparently not "informed and knowing" because counsel did not conduct an adequate investigation). The trial court's dialogue with Landrigan tells us little about his understanding of the consequences of his decision: After asking whether Landrigan had instructed his attorney not to present mitigating circumstances, the court asked only, "Do you know what that means?" Landrigan simply responded, "Yeah." There was no further exploration by the court into Landrigan's understanding, or what advice his attorney had given him outside of court.

As we recently explained:

> If a client has elected to forego legal proceedings that could avert the imposition of the death penalty, then a court must make the determination "whether he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises."

*Summerlin*, 427 F.3d at 639 (quoting *Rees v. Peyton*, 384 U.S. 312, 314 (1966)). The trial court's cursory inquiry into Landrigan's purported waiver of all mitigating evidence did not satisfy this requirement.

**[12]** For all of the foregoing reasons, Landrigan has not waived the right to assert a claim for ineffective assistance of counsel. Moreover, Landrigan has alleged facts that, if true, would establish that his counsel was ineffective for failing to investigate and discover important mitigating evidence. This alone, however, would not entitle

Landrigan to habeas relief or even to an evidentiary hearing. We therefore turn to the issue of prejudice.

B.

To establish prejudice, Landrigan must demonstrate a reasonable probability that Farrell's deficiencies "undermine confidence in the outcome" of the proceeding. *Strickland*, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.") To assess prejudice in a capital penalty phase proceeding, the Supreme Court has directed us to "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534.

That evidence includes both the evidence adduced at trial *and* the evidence adduced in habeas proceedings. *See id.* at 536; *T. Williams*, 529 U.S. at 397-98. In evaluating prejudice, the district court improperly refused to consider additional facts proffered by Landrigan, such as expert testimony regarding Landrigan's organic brain dysfunction, because the court erroneously concluded that Landrigan had failed to exhaust this claim in state court. In state court, Landrigan asserted that his counsel was ineffective because Farrell had failed to undertake a reasonable investigation of mitigating factors, including information that could have been derived from Landrigan's biological father and his adoptive sister. Landrigan summarized his claim as follows:

> Where a defendant's crime is attributable to a disadvantaged background or emotional or mental problems the defendant is less culpable than one without the excuse. *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). *See also, State v. Wallace*, 160 Ariz. 424, 427, 773 P.2d 983, 986 (1989), *cert. denied*, 494 U.S. 1047 (1990). Due to ineffective assistance from trial counsel at sentencing,

this Honorable Court did not have a complete and accurate picture of Petitioner's background.

The additional information offered by Landrigan in support of his federal habeas claim does not "fundamentally alter" the ineffective assistance claim presented to the state court. It simply provides additional evidentiary support for the claim, in particular with respect to the prejudice prong of *Strickland*. *See Vasquez v. Hillery*, 474 U.S. 254, 260 (1986); *see also Belmontes v. Brown*, 414 F.3d 1094, 1117-18 (9th Cir. 2005) ("[N]ew factual allegations do not render a claim unexhausted unless they fundamentally alter the legal claim already considered by the state courts." (quoting *Chacon v. Wood*, 36 F.3d 1459, 1468 (9th Cir. 1994) (quoting *Vasquez*, 474 U.S. at 260))) (internal quotation marks omitted).

**[13]** As discussed above, there was a significant amount of potential mitigating evidence that was not unearthed or presented to the sentencing judge. Landrigan alleges he was exposed to alcohol and drugs *in utero*, which may have resulted in cognitive and behavioral deficiencies consistent with fetal alcohol syndrome. He was abandoned by his birth mother and suffered abandonment and attachment issues, as well as other behavioral problems throughout his childhood. His adoptive mother was also an alcoholic, and Landrigan's own alcohol and substance abuse began at an early age. Based on his biological family's history of violence, Landrigan claims he may also have been genetically predisposed to violence.

**[14]** If true, Landrigan's allegations are "the very sort of mitigating evidence that 'might well have influenced the [judge's] appraisal of [Landrigan's] moral culpability.'" *Earp*, 431 F.3d at 1179 (quoting *T. Williams*, 529 U.S. at 398). "Evidence regarding social background and mental health is significant, as there is a 'belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional or mental problems, may be less culpable than defendants who have no such excuse.'" *Douglas*, 316 F.3d at 1090 (quoting *Boyde v. California*, 494

U.S. 370, 382 (1990).[5] We also note that in finding Landrigan's background or emotional character was not a mitigating circumstance, the state sentencing judge specifically noted that he had "received very little information concerning the defendant's difficult family history," implying a more complete picture could have tipped the scale in Landrigan's favor.

In comparison, there were two aggravating circumstances relied upon by the sentencing judge: (1) the defendant had prior felony convictions involving the use or threatened use of violence on another person, and (2) the defendant committed the offense with the expectation of receiving pecuniary gain. *See* Ariz. Rev. Stat. §§ 13-703(F)(2), (5). There was limited evidence regarding the pecuniary gain aggravator. The judge noted that the victim's apartment had been ransacked as if the perpetrator were looking for something, and that this demonstrated an expectation of pecuniary gain, even though Landrigan did not actually steal anything of value. On the other hand, Landrigan had been previously convicted of two violent crimes — second degree murder for the stabbing death of an individual in Oklahoma and assault and battery with a deadly weapon for stabbing another inmate while serving his second degree murder sentence.

**[15]** Notwithstanding these obviously serious prior offenses, Landrigan still may have been prejudiced by his attorney's alleged

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[5] The dissent seizes upon Landrigan's expert's diagnosis of antisocial personality disorder and analyzes whether such a disorder is sufficient to justify mitigation. [Dissent at 2351-52]. Yet this diagnosis is only a small piece of the puzzle; the crux of Landrigan's argument is that the sentencing judge was never apprised of the full panoply of circumstances that, in the expert's opinion, converged to result in "disordered behavior [that] was beyond the control of Mr. Landrigan." The dissent also suggests that Landrigan's trial behavior would have negated any attempt to elicit sympathy [Dissent at 2353-55], yet Landrigan contends this behavior was consistent with the expert's analysis of limited impulse control and an inability to take into account the consequences of his behavior. Indeed, if Landrigan's counsel had offered such mental health information, it could have actually explained his courtroom behavior and tempered its effect.

shortcomings. Even in cases involving particularly heinous murders, or substantial criminal histories, a defendant can be prejudiced by an attorney's failure to investigate and present mitigating evidence that could influence the judge's appraisal of moral culpability. *See T. Williams*, 529 U.S. at 398; *Stankewitz*, 365 F.3d at 724 (mitigating evidence could have fostered sympathy for defendant and could also have diminished the aggravating impact of the prosecution's case). Presented with the additional mitigating evidence regarding Landrigan's background and emotional and mental problems, there is a reasonable probability that, if Landrigan's allegations are true, the sentencing judge would have reached a different conclusion.

## III.

Of course, to this point, Landrigan's evidence has not been tested. Farrell has not been given an opportunity to explain what steps were taken in his investigation or why he did not do more; Landrigan's accounts of his childhood have not been explored; and the state has not had an opportunity to cross-examine his experts or challenge the strength of their opinions. We note this only to emphasize that we are not opining on what the district court's ultimate resolution of this issue should be; we conclude only that Landrigan has surpassed the relatively "low bar" of alleging a colorable claim for relief. *Earp*, 431 F.3d at 1170.

**[16]** We conclude Landrigan has alleged facts that, if demonstrated to be true, present a colorable claim that he received ineffective assistance of counsel in his capital sentencing proceeding. Landrigan has demonstrated a proper basis for an evidentiary hearing.[6]

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[6] We adopt the panel's holdings with respect to the additional sentencing issues raised in Landrigan's certificate of appealability. 272 F.3d at 1229-31.

AFFIRMED in part, REVERSED in part, and REMANDED for an evidentiary hearing.

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BEA, Circuit Judge, with whom Circuit Judge Callahan joins, dissenting:

Although I agree with the majority's conclusion that counsel's limited investigation of Landrigan's background fell below the standards of professional representation prevailing in 1990, I would not remand this case for an evidentiary hearing because Landrigan has failed to allege facts that, if proven, would demonstrate *Strickland* prejudice.

We "review do novo [a] district court's interpretation of AEDPA standards governing the grant or denial of an evidentiary hearing." *Earp*, 431 F.3d at 1166. We may reverse the denial of an evidentiary hearing only if the district court abused its discretion. *Id.*

To establish entitlement to an evidentiary hearing, Landrigan must demonstrate an objectively reasonable probability that, had counsel proved the mitigating facts now alleged, the sentencing judge would not have imposed the death penalty. *See Summerlin*, 427 F.3d at 643. Landrigan alleges that his birth mother exposed him to alcohol and drugs *in utero* and later abandoned him, that he has a genetic predisposition for violence, that his adoptive mother was an alcoholic, and that, as a result of all these factors, he has antisocial personality disorder.[1] Whether these alleged facts create an objectively reasonable

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[1] Contrary to the majority's contention, to focus on the potential mitigating effect of Landrigan's purported antisocial personality disorder is not to "seize" on a "small piece" of some larger "puzzle" of mitigating circumstances that counsel failed to investigate or present. Maj. Op. at 2348 n.5. As the majority opinion itself acknowledges, all the mitigating circumstances Landrigan faults counsel for not raising "converge" to support the suggestion that he suffers from antisocial personality disorder and cannot control his actions. *See id.* at 2340 Antisocial personality disorder is the crux of Landrigan's ineffective assistance of counsel claim.

probability that Landrigan would have received a different sentence must be considered in light of the particular circumstances of his case. *See Smith v. Stewart*, 140 F.3d 1263, 1270 (9th Cir. 1998) (explaining that the mitigating effect of antisocial personality disorder is context-dependent and that, in Arizona, the disorder "has often been treated on appeal as insufficient to justify mitigation"). Under these standards, three separate factors convince me there is no reasonable probability that Landrigan would have received a different sentence had his counsel proved the mitigating facts now alleged.

First, the mitigating effect of antisocial personality disorder is greater when there is evidence that the disorder "controlled [the] defendant's conduct or impaired his mental capacity" than when evidence suggests that, at the time of the crime, the defendant "possessed the ability to restrain himself." *State v. Brewer*, 826 P.2d 783, 802-03 (Ariz. 1992). For example, in *Brewer*, the defendant's antisocial personality disorder was insufficient to tilt the balance of mitigating and aggravating factors in favor of leniency because, notwithstanding his disorder, he had "resisted whatever impulses he may have experienced long enough to insure his own safety by locking the [victim's] roommate's dog in another room before commencing his attack on the victim." *Id.* at 803.

Here, Landrigan has submitted an expert declaration suggesting in passing that because of his antisocial personality disorder he has "very limited impulse control." The evidence, however, is that on the occasion of the murder at issue Landrigan was able to control his impulses long enough to cultivate the victim's trust and attempt to profit from their encounter. The trial testimony of one of the victim's friends, "Michael," was that prior to the murder the victim called him three times. During the first phone call, the victim reported that he and Landrigan were together drinking beer. Approximately fifteen minutes later, the victim called a second time to say he was in the middle of sexual intercourse with Landrigan. Shortly thereafter, the victim called to ask whether Michael could get Landrigan a job. Thus, just as the defendant in *Brewer* was able to control his impulses long enough to

take steps to protect his physical safety, Michael's testimony suggests Landrigan was able to control his murderous impulses long enough to earn his victim's trust, engage him in sexual relations, and allow the victim to try to get him a job. This evidence diminishes the mitigating effect of his alleged antisocial personality disorder.

Second, as the three-judge panel that initially heard Landrigan's appeal correctly recognized, in Landrigan's case the mitigating value of any proven genetic predisposition for violence would not have outweighed its aggravating tendency to suggest Landrigan was undeterrable and, even from prison, would present a future danger to society. *Landrigan v. Stewart*, 272 F.3d 1221, 1228-29 (9th Cir. 2001). One of the two statutory aggravating factors the sentencing judge found was that Landrigan had prior felony convictions involving the use or threatened use of violence on another person. *See* Ariz. Rev. Stat. § 13-703(F)(2). Landrigan had murdered his best friend and then, while incarcerated for that crime, had brutally stabbed a fellow inmate. In light of this history, and the fact that Landrigan committed the murder for which he was convicted in the present case after escaping from prison, the potential for future dangerousness—including peril to future fellow inmates—inherent in Landrigan's alleged genetic pre-disposition for violence would have negated its mitigating capacity for evoking compassion in the sentencing judge. *See People v. Franklin*, 656 N.E.2d 750, 761 (Ill. 1995) ("Although this evidence [regarding defendant's psychological problems and violent family history] could have evoked compassion in the jurors, it could have also demonstrated defendant's potential for future dangerousness and the basis for defendant's past criminal acts. The evidence of defendant's mental illness may also have shown that defendant was less deterrable or that society needed to be protected from him.").

Third, but by no means least, Landrigan's behavior at trial would have negated any effort by counsel to elicit sympathy based on a genetic or biological predisposition toward violence. The three-judge panel that originally heard this appeal aptly described Landrigan's behavior as follows:

Landrigan was not willing to merely express his opinions to counsel and, once having given those indications about his feelings, recede into comparative silence as counsel went about the business of conducting the proceeding. Quite the contrary; Landrigan took an actively aggressive posture, which ensured that counsel's attempts to place mitigating factors before the sentencing court would come a cropper. Each of counsel's feints in the mitigating direction brought a statement from Landrigan that painted an even bleaker picture and made matters even worse. But we will not merely resort to characterization; we will illustrate the situation with Landrigan's own words.

In an attempt to soften the effect of the fact that Landrigan had previously murdered his best friend, Greg Brown, counsel said that as Landrigan was walking away, Brown, a much larger man, rushed up and attacked him. Landrigan, who happened to be carrying a knife, defended himself and unfortunately killed Brown. A plausible story, but Landrigan would have none of it. His attorney got it all wrong. Rather, said he, "When we left the trailer, Greg went out of the trailer first. My wife was between us. I pulled my knife out, then I was the one who pushed her aside and jumped him and stabbed him. He didn't grab me. I stabbed him." In other words, Landrigan had come from behind and acted in a murderous way. That was all there was to it.

Landrigan behaved similarly when counsel tried to envelop the assault on another prison inmate in a brume of self defense by suggesting that Landrigan had been threatened by the victim, who was a friend of Greg

Brown and Greg's father. Landrigan responded thusly: "That wasn't Greg Brown's dad's friend or nothing like that. It was a guy I got in an argument with. I stabbed him 14 times. It was lucky he lived. But two weeks later they found him hung in his cell." Again, Landrigan had unnecessarily behaved in an extremely violent and murderous way toward another human being.

And when counsel tried to burnish Landrigan's benighted past by indicating that before Brown's murder, Landrigan, for at least one brief shining moment, was a "loving, caring husband," who had married and was taking care of his wife and her child by "working . . . at a golf course during the year-and-a-half" preceding the killing, Landrigan demurred. He explained: "Well, I wasn't just working. I was doing robberies supporting my family. We wasn't married. We wasn't married in Arizona. We lived in Oklahoma. I mean, you know, he's not getting the story straight. Why have him tell somebody else's story in the first fucking place?"

If that were not enough, Landrigan made the following presentation when the court asked if he would like to say anything in his own behalf:

> Yeah. I'd like to point out a few things about how I feel about the way this shit, this whole scenario went down. I think that it's pretty fucking ridiculous to let a fagot be the one to determine my fate, about how they come across in his defense, about I was supposedly fucking this dude. This never happened. I think the whole thing stinks. I think if you

> want to give me the death penalty, just bring it right on. I'm ready for it.

*Landrigan*, 272 F.3d at 1226-27.[2]

In light of (1) the evidence that Landrigan could and did control his murderous impulses, (2) the probability that any mitigating value of evidence of genetic or biological predisposition for violence would have been overwhelmed by the evidence's aggravating tendency to show that Landrigan was undeterrable, and (3) Landrigan's menacing behavior at trial, Landrigan has not alleged facts that if proven would create an objectively reasonable probability that he would have received a different sentence. Accordingly, it was not an abuse of discretion for the district court to deny him an evidentiary hearing. I would affirm the district court's decision in its entirety.

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[2] It appears that Landrigan continues to question his counsel's approaches to this case, as indicated by his hand-written letter to this court of August 16, 2005, stating:

> As of today, I want to withdraw my petition and drop all appeals. I no longer wish to pursue any action from your court or any others, and want my execution date to be set as soon as possible. Thank you.

**APPENDIX B**

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY TIMOTHY LANDRIGAN, a.k.a. Billy Patrick Wayne Hill,
Petitioner-Appellant,

v.

TERRY STEWART, Director, Arizona Department of Corrections,
Respondent-Appellee.

No. 00-99011

D.C. No. CV-96-02367-PHX-ROS

OPINION

Appeal from the United States District Court
for the District of Arizona
Roslyn O. Silver, District Judge, Presiding

Argued and Submitted
November 8, 2001–San Francisco, California

Filed November 28, 2001

Before: Ferdinand F. Fernandez, Pamela Ann Rymer, and Kim McLane Wardlaw, Circuit Judges.

Opinion by Judge Fernandez

## COUNSEL

Dale A. Baich, Assistant Federal Public Defender, Phoenix, Arizona, for the petitioner-appellant.

James P. Beene, Deputy Attorney General, Phoenix, Arizona, (argued); Joseph T. Maziarz, Assistant Attorney General, Phoenix, Arizona, for the respondent-appellee.

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## OPINION

FERNANDEZ, Circuit Judge:

Jeffrey Timothy Landrigan was convicted of the murder of Chester Dean Dyer in the state of Arizona and was sentenced to death. His conviction was affirmed by the Supreme Court of Arizona on direct review, his state petition for post-conviction relief was denied by the state courts, and his petition for habeas corpus under 28 U.S.C. § 2254 was denied by the district court. He appealed and his primary claim is that counsel was ineffective at sentencing. We affirm.

## BACKGROUND

In early November of 1989, Landrigan was incarcerated in an Oklahoma Department of Corrections Facility. He was serving a term of 20 years imprisonment[1] for the murder of his "best friend," Greg Brown; he had stabbed Brown to death in 1982, and had been in prison since then. While in custody, Landrigan had not been quiescent. He had an argument with another prison inmate and repeatedly stabbed him, a crime for which Landrigan was convicted in March of 1986.

Alas, on November 10, 1989, Landrigan escaped from custody in Oklahoma, and soon surfaced in Phoenix, Arizona. Within a month, he had met the victim, Chester Dean Dyer, a homosexual man who

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[1] His sentence was actually 40 years, but 20 years of it had been suspended.

often tried to pick up other men by flashing a wad of money. On December 13, 1989, Landrigan went to Dyer's apartment where the two of them drank beer, and had other pleasurable interactions, In fact, the situation was so friendly that Dyer called another friend to tell him about it, and even asked that friend if he could get Landrigan a job. The friend then spoke with Landrigan about that possibility.

Thereafter, Landrigan slew the victim by strangling and stabbing him. Dyer's body was found two days later and the Arizona Supreme Court described the murder scene in the following way:

> [Dyer] was fully clothed, face down on his bed, with a pool of blood at his head. An electrical cord hung around his neck. There were facial lacerations and puncture wounds on the body. A half-eaten sandwich and a small screwdriver lay beside it. Blood smears were found in the kitchen and bathroom. Partial bloody shoeprints were on the tile floor.

Arizona v. Landrigan, 176 Ariz. 1, 3, 859 P.2d 111, 113 (1993) (Landrigan I). It only remains to add that an ace of hearts, from a deck of cards depicting naked men in sexual poses, was carefully propped on Dyer's back, and the rest of the deck was strewn across the bed. The apartment had been ransacked, and there were drops of blood on the bedding, the kitchen sink and the bathroom counter top.

Landrigan was soon caught, and was prosecuted for first degree murder and other crimes, convicted in a jury trial, and ultimately sentenced to death by the trial judge, who found aggravating circumstances, but insufficient mitigating circumstances to outweigh them. She opined that although the crime was not out of the ordinary as first degree murders go, Landrigan was. As she put it:

> I find the nature of the murder in this case is really not out of the ordinary when one considers first degree murder, but I do find that Mr. Landrigan appears to be somewhat of an exceptional human being. It appears that Mr. Landrigan is a person who has no scruples and

> no regard for human life and human beings and the right to live and enjoy life to the best of their ability, whatever their chosen life-style might be. Mr. Landrigan appears to be an amoral person.

Landrigan appealed to the Arizona Supreme Court and raised a number of issues, including improper imposition of the death sentence and ineffective assistance of counsel at and before sentencing. That court affirmed. See id. at 8, 859 P.2d at 118.

Landrigan then filed a petition in the Arizona Superior Court for post-conviction relief in which he, again, asserted ineffective assistance of counsel because of counsel's failure to present mitigating evidence. The post-conviction judge, who had been the trial judge, denied post-conviction relief; the Arizona Supreme Court denied review. Landrigan then filed his present petition for habeas corpus relief in the district court. It, too, denied relief, and this appeal ensued.

STANDARD OF REVIEW

We review the district court's decision to deny a 28 U.S.C. § 2254 habeas corpus petition de novo. See Bribiesca v. Galaza, 215 F.3d 1015, 1018 (9th Cir. 2000). Because Landrigan filed his petition after April 24, 1996, it is governed by the standard of review set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d)(1). To obtain habeas corpus relief under the AEDPA, Landrigan must show that the state courts' denial of his ineffective assistance of counsel claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Id.

DISCUSSION

A. Ineffective Assistance of Counsel

Landrigan's principal claim is that he had ineffective assistance of counsel at his penalty phase hearing because counsel failed to present

mitigating evidence. Certainly, Landrigan is entitled to have mitigating evidence presented on his behalf; certainly, little was presented here. Were that all there was to say, this might have been a relatively easy case for reversal; as it is, the opposite conclusion is called for. The standards we must use are well known, and we will but synopsize them before turning to the circumstances of this case.[2]

We must decide whether counsel was ineffective based on the now familiar factors set forth by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In order to obtain relief, [Landrigan] must show both that counsel "was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment," and that the deficiency prejudiced him. Id. at 687, 104 S. Ct. at 2064.

[2] The first factor requires the defendant to show "that counsel's representation fell below an objective standard of reasonableness." Id. at 688, 104 S. Ct. at 2064. And in determining whether it did, we must be "highly deferential," avoid "the distorting effects of hindsight," and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689, 104 S. Ct. at 2065.

The second factor requires that counsel's errors "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687, 104 S. Ct. at 2064. That in turn means that there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068. And that in turn means that the unprofessional errors were egregious enough "to undermine confidence in the outcome." Id.; see also United States v. Span, 75 F.3d 1383, 1387 (9th Cir. 1996); Clabourne v. Lewis, 64 F.3d 1373, 1378 (9th Cir. 1995).

Of course, all of these rules apply to the death penalty phase of a

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[2] The next four paragraphs of this opinion are quoted from Smith v. Stewart, 140 F.3d 1263, 1268-69 (9th Cir. 1998). For ease of reading, they are not indented or shown with any quotation marks that are not already contained in Smith itself.

prosecution. Strickland itself was a murder prosecution, and the Supreme Court did apply its rules to the death penalty part of the case. See 466 U.S. at 698-701, 104 S. Ct. at 2070-71; see also, Clabourne, 64 F.3d at 1378.

Counsel did present some mitigating evidence in his sentencing memorandum to the trial court, which included medical documents regarding Landrigan's juvenile alcoholism and use of drugs. A different and difficult situation confronted counsel at sentencing because Landrigan refused to have mitigating evidence presented to the court. At the outset, counsel explained to the court that he had two family members present, but that they had refused to testify on Landrigan's behalf. When the court asked why, counsel said:

> Basically it's at my client's wishes, Your Honor. I told him that in order to effectively represent him, especially concerning the fact that the State is seeking the death penalty, any and all mitigating factors, I was under a duty to disclose those factors to this Court for consideration regarding the sentencing. He is adamant he does not want any testimony from his family, specifically these two people that I have here, his mother, under subpoena, and as well as having flown in his ex-wife.
>
> I have advised him and I have advised him very strongly that I think it's very much against his interests to take that particular position.

Landrigan did not controvert that statement. In fact, the court decided to question him, and the following dialogue ensued:

> THE COURT: Mr. Landrigan, have you instructed your lawyer that you do not wish him to bring any mitigating circumstances to my attention?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: Do you know what that means?

THE DEFENDANT: Yeah.

THE COURT: Mr. Landrigan, are there mitigating circumstances I should be aware of?

THE DEFENDANT: Not as far as I'm concerned.

Landrigan's position could hardly have been more plain.

Courts have been somewhat cautious when dealing with an ineffectiveness claim based upon a client's demand that a certain course of action not be pursued, even if it might be to his benefit. In Strickland, 466 U.S. at 691, 104 S. Ct. at 2066, the Supreme Court did comment that "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." That does not quite say that the defendant absolutely controls the situation. A similarly strong, yet hedged, statement was made by the Eleventh Circuit where it stated that "[w]hen a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made," Mitchell v. Kemp, 762 F.2d 886, 889 (11th Cir. 1985), but went on to state that counsel investigated anyway and "did not blindly follow" his client's directions, id. at 890. We have taken a substantially similar approach. Thus, we have said that counsel was not ineffective when he failed to present mitigating evidence after his client directed him not to do so. Jeffries v. Blodgett, 5 F.3d 1180, 1197-98 (9th Cir. 1993). We did note, however, that counsel was prepared to present the evidence, and that the client had made a knowing and intelligent decision which precluded that. Id. at 1198. On the other hand, we have also stated that the lack of discovery and presentation of mitigating evidence could not be laid at counsel's feet where the client, "fired his attorneys precisely because they wanted to gather and introduce mitigating evidence on his behalf." Moran v. Godinez, 57 F.3d 690, 700 (9th Cir. 1994). And in a case where a defendant was "determined and unequivocal" in his decision to plead guilty and seek the death penalty, we opined that counsel's failure to offer additional advice and obtain a defense psychiatrist did not show ineffective assistance. Langford v. Day, 110 F.3d 1380, 1388 (9th Cir. 1997). More recently,

in a case where an attorney's decision regarding the presentation of certain evidence appeared to have been influenced by his client's wishes, we rather blandly opined that "[w]e believe that when the competence of a lawyer's tactical or strategic decision is being reviewed, the lawyer is entitled to an additional measure of deference if he acts in conformity with the client's wishes." Summerlin v. Stewart, No. 98-99002, slip op. 14361, 14400 (9th Cir. Oct. 12, 2001).

Perhaps the best synthesis of the above authorities is that it all depends. We do have to give deference to counsel's choices and determinations, but our ultimate decision will depend upon the facts and circumstances of the particular case before us. In the constellation of refusals to have mitigating evidence presented, however, this case is surely a bright star. No other case could illuminate the state of the client's mind and the nature of counsel's dilemma quite as brightly as this one. No flashes of insight could be more fulgurous than those which this record supplies.

Landrigan was not willing to merely express his opinions to counsel and, once having given those indications about his feelings, recede into comparative silence as counsel went about the business of conducting the proceeding. Quite the contrary; Landrigan took an actively aggressive posture, which ensured that counsel's attempts to place mitigating factors before the sentencing court would come a cropper. Each of counsel's feints in the mitigation direction brought a statement from Landrigan that painted an even bleaker picture and made matters even worse. But we will not merely resort to characterization; we will illustrate the situation with Landrigan's own words.

In an attempt to soften the effect of the fact that Landrigan had previously murdered his best friend, Greg Brown, counsel said that as Landrigan was walking away, Brown, a much larger man, rushed up and attacked him. Landrigan, who happened to be carrying a knife, defended himself and unfortunately killed Brown. A plausible story, but Landrigan would have none of it. His attorney got it all wrong. Rather, said he, "When we left the trailer, Greg went out of the trailer first. My wife was between us. I pulled my knife out, then I was the

one who pushed her aside and jumped him and stabbed him. He didn't grab me. I stabbed him." In other words, Landrigan had come from behind and acted in a murderous way. That was all there was to it.

Landrigan behaved similarly when counsel tried to envelop the assault on another prison inmate in a brume of self defense by suggesting that Landrigan had been threatened by the victim, who was a friend of Greg Brown and Greg's father. Landrigan responded thusly: "That wasn't Greg Brown's dad's friend or nothing like that. It was a guy I got in an argument with. I stabbed him 14 times. It was lucky he lived. But two weeks later they found him hung in his cell." Again, Landrigan had unnecessarily behaved in an extremely violent and murderous way toward another human being.

And when counsel tried to burnish Landrigan's benighted past by indicating that before Brown's murder, Landrigan, for at least one brief shining moment, was a "loving, caring husband," who had married and was taking care of his wife and her child by "working . . . at a golf course during the year-and-a-half" preceding the killing, Landrigan demurred. He explained: "Well, I wasn't just working. I was doing robberies supporting my family. We wasn't married. We wasn't married in Arizona. We lived in Oklahoma. I mean, you know, he's not getting the story straight. Why have him tell somebody else's story in the first fucking place?"

If that were not enough, Landrigan made the following presentation when the court asked if he would like to say anything in his own behalf:

> Yeah. I'd like to point out a few things about how I feel about the way this shit, this whole scenario went down. I think that it's pretty fucking ridiculous to let a fagot be the one to determine my fate, about how they come across in his defense, about I was supposedly fucking this dude. This never happened. I think the whole thing stinks. I think if you want to give me the death penalty, just bring it right on. I'm ready for it.

In effect, then, the record shows that counsel was able to get some mitigating evidence before the trial court. That court knew about Landrigan's past history of difficulty with drugs and alcohol, and did hear of the more benign explanations of Landrigan's behavior that we have outlined, although it also heard Landrigan's "corrections" of that information. In addition, it knew that had counsel been able to elicit evidence at the hearing, he would have sought a continuance to obtain expert evidence to further support the case for mitigation. The trial judge expressed no problem with that approach and, indeed, seemed amenable to it. Thus, it appears that the investigation was not necessarily over just because the sentencing hearing had commenced; it was, however, then truncated because of Landrigan's refusal to allow evidence to be presented at that hearing. Nevertheless, we do not hold that Landrigan's statements foreclose us from any further exploration of the circumstances. Rather, as we have done in other cases, we press on.

Landrigan argues that the record does not demonstrate that counsel's investigation of the case up to the point of the sentencing hearing itself had been very robust. We agree that from what we now have before us the investigation appears to have been rather asthenic. In another case, we might well say it was prejudicially asthenic. See Ainsworth v. Woodford, 268 F.3d 868, 878 (9th Cir. 2001) (emotional and mental history and other background has to be developed); Caro v. Calderon, 165 F.3d 1223, 1227 (9th Cir. 1999) (childhood background must be developed); Bean v. Calderon, 163 F.3d 1073, 1079 (9th Cir. 1998) (sufficient information must be given to experts); Clabourne, 64 F.3d at 1384 (mental history must be developed). Here, however, given Landrigan's apparently adamant insistence that mitigating evidence not be presented, it can reasonably be said that any deficiency in counsel's investigation could not have been prejudicial. On the other hand, it can also be said that if the investigation had been more thorough, Landrigan would have had more information from which he could make an intelligent decision about whether he wanted some mitigating evidence presented. Perhaps he would not have dealt with all other evidence in the way he dealt with the evidence that was presented; perhaps in some respect he would have tried to make the gloom surrounding him somewhat less inspissate.

What would he have done? For that we must again turn to Landrigan himself. Over four years after his sentencing, and even now, Landrigan's only personal declaration indicates that he would have cooperated in presentation of evidence on a single ground – genetic predisposition. As he put it "had trial counsel raised that aspect with him, [he] would have cooperated." If we take Landrigan at his word,[3] we must consider whether it is reasonably probable that use of that theory would have produced a different result. See Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. We must ask if its absence undermines our confidence in the outcome. See Smith, 140 F.3d at 1268. It does not.

That theory was rather exotic at the time, and still is.[4] It suggests that Landrigan's biological background made him what he is. Even had counsel been permitted by Landrigan to submit the genetic violence theory, given the other evidence before the sentencing court, we are satisfied that the result would not have been affected. We recognize that it is parlous indeed to predict what will affect a trial judge at sentencing. See Smith, 140 F.3d at 1270. Yet, there are times when we can confidently say that there would have been no difference in the result. This is one of those times.

The murder here, while vile enough, was not itself so vile and exceptional that "it was highly improbably that mitigating factors of any ordinary stripe would help." Id. at 1271; see also Gerlaugh v. Stewart, 129 F.3d 1027, 1042-43 (9th Cir. 1997); Bonin v. Calderon, 59 F.3d 815, 836 (9th Cir. 1995). However, as the Arizona courts pointed out, the murderer himself was exceptional; exceptionally unscrupulous; exceptionally lacking in regard for others; exceptionally lacking in morals.

It is highly doubtful that the sentencing court would have been

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[3] The state courts did not do so. The state post-conviction judge, who was the sentencing judge also, said "Again, the defendant's statements at sentencing belie his new-found sense of cooperation."

[4] See Mobley v. Head, No. 00-13980, 2001 WL 1172694, at *6 (11th Cir. Oct. 4, 2001) (not ineffective to present genetic disposition theory to jury); Turpin v. Mobley, 269 Ga. 635, 642-45, 502 S.E.2d 458, 465-67 (1998) (same).

moved by information that Landrigan was a remorseless,[5] violent killer because he was genetically programmed to be violent, as shown by the fact that he comes from a family of violent people, who are killers also. When faced with a similar claim about counsel's failure to present a family history of mental illness and violence, "including the fact that [the defendant's] father had murdered someone," the Illinois Supreme Court opined that there was no reasonable probability that the sentencer would not have awarded the death penalty anyway. People v. Franklin, 167 Ill. 2d 1, 26, 656 N.E.2d 750, 761 (1995). In fact, said the court, while the evidence "could have evoked compassion, . . . it could have also demonstrated defendant's potential for future dangerousness." Id. at 27, 656 N.E.2d at 761. It could have shown that he was "less deterrable or that society needed to be protected from him." Id. So it is here; although Landrigan's new evidence can be called mitigating in some slight sense, it would also have shown the court that it could anticipate that he would continue to be violent. He had already done that to a fare-thee-well. The prospect was chilling; before he was 30 years of age, Landrigan had murdered one man, repeatedly stabbed another one, escaped from prison, and within two months murdered still another man. As the Arizona Supreme Court so aptly put it when dealing with one of Landrigan's other claims, "[i]n his comments, defendant not only failed to show remorse or offer mitigating evidence, but he flaunted his menacing behavior." Landrigan I, 176 Ariz. at 8, 859 P.2d at 118. On this record, assuring the court that genetics made him the way he is could not have been very helpful.[6] There was no prejudice.

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[5] Even aside from what he said at the sentencing hearing, that Landrigan was remorseless can hardly be doubted. After he killed his best friend, Greg Brown, he told a sheriff: "Jim, I tried to kill the m---- f---. I don't take shit off nobody." Landrigan v. State, 700 P.2d 218, 219 (Okla. Crim. App. 1985). And after killing Dyer, he bragged to an ex-girlfriend that "he had 'killed a guy . . . with his hands' about a week before." Landrigan I, 176 Ariz. at 4, 859 P.2d at 114.

[6] In that regard, it should be noted that the new affidavits from family members and former friends do not tend to soften Landrigan's image. They, again, adumbrate a picture of a self-centered, dangerous individual, who would not learn from experience despite well-intentioned efforts.

In fine, the district court did not err when it refused to issue the writ on the basis of ineffective assistance of counsel.[7]

B. Other Contentions

Landrigan also mounts a number of other attacks upon his sentencing, none of which can enable him to prevail.

Landrigan asserts that the whole Arizona capital sentencing scheme is unconstitutional because a judge, rather than a jury, decides the sentencing issue. See Ariz. Rev. Stat. § 13-703. The Supreme Court has ruled otherwise. See Walton v. Arizona, 497 U.S. 639, 647-49, 110 S. Ct. 3047, 3054-55, 111 L. Ed. 2d 511 (1990). But, says Landrigan, Apprendi[8] undercuts Walton. Perhaps so, but we must leave it to the Court to overrule its own cases, if and when it decides to do so. See Rodriguez De Quijas v. Shearson Am. Express, Inc., 490 U.S. 477, 484, 109 S. Ct. 1917, 1921-22, 104 L. Ed. 2d 526 (1989); Hoffman v. Arave, 236 F.3d 523, 542 (9th Cir. 2001), cert. denied, ____ U.S. ____, 122 S. Ct. 323, ____ L. Ed. 2d ____, (2001). We need not, and do not, decide whether Apprendi applies at all in this habeas corpus proceeding. (Cf. Jones v. Smith, 231 F.3d 1227, 1238 (9th Cir. 2000) (Apprendi is a new rule which does not apply on collateral review of cases where elements omitted from state information.).

Landrigan next attacks his sentencing because once the state

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[7] We have not overlooked Landrigan's contentions that the district court improperly limited expansion of the record before it and denied an evidentiary hearing, but we see no merit in those contentions. The district court did allow significant expansion of the record. See Fed. R. Governing § 2254 Cases 7. What it allowed was sufficient, and Landrigan has not shown why additional evidence was relevant and would have affected the outcome. The district court did not abuse its discretion. See Flamer v. Delaware, 68 F.3d 710, 735 (3d Cir. 1995); McDougall v. Dixon, 921 F.2d 518, 532-33 (4th Cir. 1990); Watts v. United States, 841 F.2d 275, 277 (9th Cir. 1988) (per curiam). Similarly, the district court did not abuse its discretion when it determined that an evidentiary hearing was not required. See Fed. R. Governing § 2254 Cases 8; Shah v. United States, 878 F.2d 1156, 1160 (9th Cir. 1989); Watts, 841 F.2d at 277.

[8] Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d (2000).

trial court rejected his alleged intoxication and past history of drug use as a statutory mitigating factor, it did not go on to consider them as a nonstatutory mitigating factor. It was required to do so. See Arizona v. Schackart, 190 Ariz. 238, 252, 947 P.2d 315, 329 (1997); Arizona v. Jones, 185 Ariz. 471, 489-91, 917 P.2d 200, 218-20 (1996). Nevertheless, the Arizona Supreme Court could correct that error by reweighing the factors on appeal. It did so here. It said: "[w]e have independently reviewed the record to determine the presence or absence of aggravating and mitigating circumstances, and the propriety of the death penalty." Landrigan I, 176 Ariz. at 6, 859 P.2d at 116. It then concluded that, "[w]e also agree that the record does not present mitigating evidence sufficiently substantial to call for leniency." Id. at 7, 859 P.2d at 117. We have no reason to disbelieve those statements, and they suffice to obviate any error by the trial court. See Poland v. Stewart, 117 F.3d 1094, 1101 (9th Cir. 1997); Jeffers v. Lewis, 38 F.3d 411, 415 (9th Cir. 1994).[9]

Finally, Landrigan attacks his sentencing because in the presentence report the probation officer noted that Dyer's brother "felt the defendant deserved the death penalty," and a police detective believed "the defendant should get a maximum sentence." But, when the Supreme Court has rejected state attempts to require juries to consider family member comments on the proper penalty, that has been because "the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." Booth v. Md., 482 U.S. 496, 508, 107 S. Ct. 2529, 2536, 96 L. Ed. 2d 440 (1987), overruled on other grounds by Payne v. Tenn., 501 U.S. 808, 830, 111 S. Ct. 2597, 2611, 115 L. Ed. 2d 720 (1991). As the Court said, "Any decision to impose the death sentence must

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[9] At any rate, any error in failing to consider Landrigan's use of alcohol and drugs would have been inconsequential; it would have had no effect whatsoever on the outcome. See Bryson v. Ward, 187 F.3d 1193, 1205-06 (10th Cir. 1999) cert. denied, 529 U.S. 1058, 120 S. Ct. 1566, 146 L. Ed. 2d 469 (2000); Boyd v. French, 147 F.3d 319, 327 (4th Cir. 1998); Bolender v. Singletary, 16 F.3d 1547, 1566-67 (11th Cir. 1994); see also Clemons v. Mississippi, 494 U.S. 738, 753-54, 110 S. Ct. 1441, 1451, 108 L. Ed. 2d 725 (1990); Hitchcock v. Dugger, 481 U.S. 393, 399, 107 S. Ct. 1821, 1824, 95 L. Ed. 2d 347 (1987).

'be, and appear to be, based on reason rather than caprice or emotion.'" Id. (citation omitted). There is absolutely no reason to believe that the sentencing judge was influenced or otherwise diverted from her task by the opinion statements in question here. On this record, there is no reason to think that even possible, and the trial judge as much as said that she had not considered the information. Certainly, the fairness of the proceeding was not affected. Rather, "we must assume that the trial judge properly applied the law and considered only the evidence [she] knew to be admissible." Gretzler v. Stewart, 112 F.3d 992, 1003, 1009 (9th Cir. 1997).

CONCLUSION

When Landrigan was facing the possibility that the death penalty would be imposed upon him for the murder of his victim, he prevented the placement of some mitigating evidence before the sentencing judge. In fact, when counsel attempted to cast Landrigan's past history in a somewhat better light, Landrigan was quick to demolish those attempts and make sure that the court saw his past as drear indeed. He left the Arizona courts with the thought that he was minatory and remorseless. Landrigan I, 176 Ariz. at 8, 859 P.2d at 118. He does say that he would have allowed the presentation of genetic predisposition evidence, but it is not reasonably probable that the outcome would have been affected by that evidence. Perhaps Landrigan now regrets his stance, but we do not sit to palliate regrets. We sit to determine whether there has been error of constitutional magnitude. There has not been.

AFFIRMED.

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**APPENDIX C**

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CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA
BY s/ _____DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

| | |
|---|---|
| JEFFREY TIMOTHY LANDRIGAN, | ) |
| | ) NO. |
| | ) CIV-96-2367-PHX- |
| | ) ROS |
| Petitioner, | ) |
| | ) MEMORANDUM OF |
| v. | ) DECISION AND ORDER |
| | ) |
| TERRY STEWART, et al., | ) |
| | ) |
| Respondents, | ) |
| | ) |

Petitioner, Jeffrey Timothy Landrigan, filed a First Amended Petition for Writ of Habeas Corpus as well as a First Amendment to First Amended Petition for Writ of Habeas Corpus alleging that he is imprisoned and sentenced to death in violation of the United States Constitution. The First Amended Petition and amendment thereto raised seventeen claims. By Order dated June 10, 1998,the Court determined that Claims 1, 4, 6, 7, 8, 10, 11, and 13 were entitled to merits review and that all other claims were procedurally barred. Petitioner has also requested additional discovery and an evidentiary hearing. This Order addresses the merits of the remaining eight claims and Petitioner's requests for discovery and an evidentiary hearing. For the reasons stated herein the Court finds that Petitioner

is not entitled to federal habeas relief. The Court denies Petitioner's requests for additional discovery and an evidentiary hearing.

## FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On June 28, 1990, a jury found Petitioner Jeffrey Landrigan guilty of burglary in the second degree, theft, and murder in the first degree. On October 25, 1990, the trial court sentenced Petitioner to 20 years on the burglary count, six months on the theft count, and death on the murder charge.

In State v. Landrigan, the court upheld Petitioner's convictions, summarizing the facts as follows:

> Evidence at trial established that the victim's body was found in his residence on December 15, 1989. According to the testimony of a friend ("Michael"), the victim had been a promiscuous homosexual who frequently tried to "pick up" men by flashing a wad of money. This would invariably occur after he got paid. The victim told Michael that he had recently met a person named "Jeff," with whom he wanted to have sex. The victim's physical description of Jeff was later found to closely approximate defendant.
>
> Michael received three phone calls from the victim on Wednesday, December 13, 1989. During the first, the victim said he had picked up Jeff, that they were at the apartment drinking beer, and he wanted to know whether Michael was coming over to "party." Approximately 15 minutes later, the victim called a second time and said that he was in the middle of sexual intercourse with Jeff. Shortly thereafter, the victim called to ask whether Michael could get Jeff a job. Jeff spoke with Michael about employment, and asked if he was going to come over. Michael said no. During one of these conversations, the victim indicated that he had picked up his paycheck that day.

The victim failed to show up for work the following day, and calls to him went unanswered. On Friday, a co-worker and two others went to the victim's apartment and found him dead. He was fully clothed, face down on his bed, with a pool of blood at his head. An electrical cord hung around his neck. There were facial lacerations and puncture wounds on the body. A half-eaten sandwich and a small screwdriver lay beside it. Blood smears were found in the kitchen and bathroom. Partial bloody shoeprints were on the tile floor.

Cause of death was ligature strangulation. Medical testimony at the presentence hearing indicated that the victim probably was strangled after being rendered unconscious from blows to the head with a blunt instrument.

Acquaintances testified that the apartment usually was neat. When the body was found, however, the apartment was in disarray. Drawers and closets were open; clothes and newspapers were strewn on the floor. The remnants of a Christmas present lay open and empty at the foot of the bed. In the kitchen area were two plates, two forks, a bread wrapper, luncheon meat, cheese wrappers, and an open jar of spoiled mayonnaise. A five-pound bag of sugar was spilled on the floor. A clear impression of the sole of a sneaker appeared in the sugar. Neither the paycheck nor its proceeds were located. Although the apartment had been ransacked, nothing else seemed to be missing.

When [Landrigan] first was questioned, he denied knowing the victim or ever having been to his apartment. When arrested, however, he was wearing a shirt that belonged to the victim. Seven fingerprints taken from the scene matched [Landrigan's]. The impression in the sugar matched his sneaker, down to a small cut on the sole. Tests also revealed that a small amount of blood had seeped into the sneaker. The blood matched that found on the shirt worn by the victim.

[Landrigan's] ex-girlfriend testified that she had three telephone conversations with him in December of 1989. During one of those, [Landrigan] told her that he was "getting along" in Phoenix by "robbing." [Landrigan] placed the last call to her from jail sometime around Christmas. He said that he had "killed a guy ... with his hands" about a week before.

The jury found [Landrigan] guilty of theft, second degree burglary, and felony murder for having caused the victim's death "in the course of and in furtherance of" the burglary. The jury also determined that [Landrigan] previously had been convicted in Oklahoma of assault and battery with a deadly weapon, second degree murder, and possession of marijuana. At the time of the Arizona incident, [Landrigan] was an escapee from an Oklahoma prison.

At the sentencing hearing, the trial judge found two statutory aggravating circumstances under A.R.S. § 13-703(F): that [Landrigan] was previously convicted of a felony involving the use or threat of violence on another person; and, that [Landrigan] committed the offense in expectation of the receipt of anything of pecuniary value. In making the latter finding, the trial judge noted that the victim's apartment had been ransacked, and it appeared the culprit was looking for something.

The trial judge found no statutory mitigating circumstances sufficient to call for leniency. As for non-statutory mitigating circumstances, she identified family love and absence of premeditation. She stated, however, that the mitigating factors did not outweigh the aggravating circumstances. [Landrigan] was sentenced to an aggravated term of 20 years on the burglary count, to six months in the county jail for theft and to death for murder.

State v. Landrigan, 176 Ariz. 1, 3-4, 859 P.2d 111, 113-114, cert. denied, 510 U.S. 927 (1993).

After the Arizona Supreme Court upheld Petitioner's conviction, he filed a Petition for Post-Conviction Relief pursuant to Rule 32, Ariz.R.Crim.P. The Rule 32 Court summarily dismissed the Petition and denied Petitioner's request for an evidentiary hearing on July 17, 1995. Petitioner filed a Petition for Review with the Arizona Supreme Court on December 5, 1995, which was denied on June 19, 1996. The Arizona Supreme Court issued a warrant for Petitioner's execution on October 29, 1996, fixing the date for execution as December 3, 1996.

On October 16, 1996, Petitioner filed his Preliminary Petition for Writ of Habeas Corpus in this Court and a finalized Petition on July 31, 1997.[1] Respondents filed an Answer to the finalized Petition on September 15, 1997. Petitioner subsequently moved to amend his Petition to include two additional claims on September 15, 1997, which the Court allowed. Respondents filed an Amended Answer.

On November 11, 1997, Petitioner filed a traverse. On December12, 1997, Petitioner filed a corrected traverse pursuant to an order of this Court. Respondents filed a Reply to the corrected traverse, and Petitioner filed a Sur-Reply.

On June 10, 1998, the Court entered its order regarding the procedural status of Petitioner's claims and ordered the parties to brief the merits of the remaining claims. Along with his memorandum on the merits, Petitioner filed a Motion to Expand the Record Under Rule 7 of the Rules Governing Section 2254 Cases on November 17, 1998. On March 5, 1999, Petitioner filed a Second Motion to Expand the Record.

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1. As with his Petition for Writ of Habeas Corpus, Petitioner has embellished his Amended Memorandum (File doc. 91) with a number of pictures of the Petitioner and his family. The photographs are not relevant in deciding the merit issues in this case, and the Court has therefore disregarded all photographs of the Petitioner and his family which appear in the Amended Memorandum.

Petitioner filed his Motion to Stay on August 25, 1999, asking the Court to stay these proceedings.

## STANDARD OF REVIEW

This case is governed by the Anti-Terrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254, (AEDPA). Pursuant to § 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Determination of factual issues by the state court "shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). The burden is on the Petitioner to rebut that presumption of correctness by clear and convincing evidence. Id.

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"File doc." refers to the documents in this Court's file. "R.T." signifies the reporters' transcripts, "M.E" refers to the minute entries of the state court, and "R.O.A." refers to the state court record on appeal.

## DISCUSSION

**Claim 1: The death qualification of the jury by the trial court violated Petitioner's rights as guaranteed by the Sixth and Fourteenth Amendments.**

"[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Witherspoon v. Illinois, 391 U.S. 510, 522 (1968). "A 'death-qualified' jury is one from which prospective jurors have been excluded for cause in light of their inability to set aside their views about the death penalty that 'would prevent or substantially impair the performance of [their] duties as [jurors] in accordance with [their] instructions and [their] oath.'" Buchanan v. Kentucky, 483 U.S. 402, 408 n.6 (1987) (internal quotes, cites, omitted).

Petitioner's "death qualification" claim is premised upon the presentation of death penalty questions to members of the venire by the trial court. The specific questions to which Petitioner objects are as follows:

> Are there any of you here that have strong feelings concerning the death penalty whereby you would tend to avoid finding a defendant guilty knowing that the possible punshment (sic) could be death?

* * *

Is there anyone here that has strong opinions concerning the death penalty, with your opinions being so strong it might influence the way you view the evidence in this case?

Is there anyone here who would prefer not to sit as a juror because of the nature of the charges?

Petitioner claims that it was prejudicial to inquire into the venire members' beliefs regarding the death penalty prior to the commencement of the trial, because jurors do not participate in the sentencing process and are instructed not to consider sentence during deliberation on questions of guilt.

Petitioner does not assert that any of the venire members were excluded from the jury based upon their answers to the trial court's qustions.[2] Of the seventeen jurors who expressed a preference not to sit on a jury in a capital case, none were excluded for cause. (R.T., 6/18/90, 12:10 p.m., at 59). Rather, three were peremptorily stricken by the prosecution, three were excused for medical reasons or planned vacations, four were excluded by peremptory challenges exercised by Petitioner's counsel, one actually served on the jury, and six were neither chosen nor stricken. (R.O.A., Photostated Instruments, Item 63; R.T. 6/18/90, 6:10 p.m., at 3-4).

Petitioner has failed to demonstrate that the trial court's questions to the venire were contrary to or constituted an unreasonable application of Witherspoon. The jury at Petitioner's trial was not "death-qualified," because no jurors were excluded for cause as a

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2. Petitioner claims that if prospective jurors have concerns about the death penalty, they "will remove themselves from the pool." (File doc. 91, p. 72). Petitioner erroneously imputes the authority of the trial court to exclude prospective jurors for cause to the jurors themselves. It is the trial court that excludes prospective jurors from the jury panel. Furthermore, the concern of a constitutional inquiry relating to exclusion of jurors focuses on impermissible state action, namely the improper exclusion of prospective jurors by the court or counsel.

result of the opinions they expressed about the death penalty.[3] The Court will therefore deny Petitioner's First Claim for Relief.

**Claim 4: The failure by the trial court to offer the jury instruction on lesser included offenses violated Landrigan's rights under the Eighth and Fourteenth Amendments.**

Petitioner claims the trial court erred in failing to instruct the jury on the noncapital offenses of second degree murder or manslaughter as lesser included offenses. The Court disagrees.

Petitioner was convicted of felony-murder. Under Arizona law, neither second-degree murder nor manslaughter are lesser included offense of felony-murder. State v. Dickens, 187 Ariz. 1, 23, 926 P.2d 468, 490 (Ariz. 1996), cert. denied, 522 U.S. 920 (1997) ("there are no lesser included offenses to felony murder"). Thus, the trial court was not required to instruct the jury as to those separate offenses. Hopkins v. Reeves, 524 U.S. 88, 118 S. Ct. 1895, 1900-01 (1998).

The rule in Beck v. Alabama, 447 U.S. 625 (1980) is not as broad as Petitioner suggests. Rather, Beck requires that where a lesser

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3. Petitioner does not appear to assert that it is improper to use peremptory challenges to exclude members of the venire from the jury based upon their views concerning the death penalty. There is no Supreme Court precedent on this issue, and the trial court's allowance of the use of peremptory challenges in this manner must therefore be upheld under § 2254(d)(1). Nevertheless, the Court notes that the use of peremptory challenges to exclude venire members for their opinions concerning the death penalty has generally been held proper. See, e.g., Burks v. Borg, 27 F.3d 1424, 1429 (9th Cir. 1994), cert. denied 513 U.S. 1160 (1995); Pitsonbarger v. Gramley, 141 F.3d 728, 735 (7th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 448 (1998); Brown v. Dixon, 891 F.2d 490, 497 (4th Cir. 1989), cert. denied, 495 U.S. 953 (1990) ("state may use its peremptory challenges to purge a jury of veniremen not excludible for cause under Witherspoon"); State v. Detrich, 188 Ariz. 57, 66, 932 P.2d 1328, 1337, cert. denied, 522 U.S. 879 (1997).

included offense exists for the charged crime, and where there is evidence to support a verdict on the lesser included offense, the failure to permit a jury instruction on the lesser included offense is unconstitutional. Beck, 447 U.S. at 638.[4] It does not require that the trial court invent lesser included offenses to capital crimes *sua sponte* merely so that the jury may consider a noncapital alternative where no such alternative exists under state law. Hopkins, 524 U.S. at ___, 118 S. Ct. at 1901.

Moreover, the jury was instructed as to two alternative, noncapital offenses in this case: burglary and theft. The jury was thus not presented with an "all or nothing" choice to either convict Petitioner of a capital offense or acquit him altogether. See Schad, 501 U.S. at 646.

Petitioner further argues that the Court, in determining whether a jury instruction on second degree murder should have been given, should consider the fact that Petitioner was initially charged with second degree murder and that the state offered him a plea bargain to second degree murder. Petitioner has failed to cite any Supreme Court authority in support of this contention. In fact, the Hopkins decision suggests that if an instruction on second degree murder had been given despite the fact Petitioner was not being tried for second degree murder, and if Petitioner had been convicted of second degree murder and not felony-murder, such an instruction would have constituted reversible error. Hopkins, 524 U.S. at __, 118 S.Ct. at 1900. Moreover, in capital cases, plea negotiations in which the state offers a defendant to plead to a crime which does not result in a sentence of death are the only type of negotiations which are reasonably expected to be accepted by the defendant. Therefore, the state's offer to Petitioner to plead to second degree murder does not necessarily indicate that the state believed a death sentence to be

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4. Beck does not require that the jury be instructed on all available lesser included offenses. Schad v. Arizona, 501 U.S. 624, 646 (1991). Rather, it requires that where lesser included offenses are available, at least one must be given. 501 U.S. at 647-648.

inappropriate in this case. The Court finds that the state court's resolution of this claim is not contrary to or an unreasonable application of Beck or Hopkins, and thus will deny Petitioner's Fourth Claim for Relief.

**Claim 6: Petitioner's rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments were violated as a result of the ineffective assistance of counsel that he received at the sentencing phase of the capital proceeding.**

To prevail on a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). The performance inquiry is whether counsel's assistance was reasonable considering all the circumstances. 466 U.S. at 688-89. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." 466 U.S. at 689 (internal quotes omitted).

A petitioner must affirmatively prove prejudice. 466 U.S. at 693. The petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. "The assessment of prejudice should proceed on the assumption that the decision-maker is reasonably, conscientiously, and impartially applying the standards that govern the decision." 466 U.S. at 695.

A court need not address both components of the inquiry, or follow any particular order. If it is easier to dispose of an

ineffectiveness claim on the ground of lack of sufficient prejudice, without evaluating counsel's performance, that should be done. 466 U.S. at 697.

### A. Conduct Subject to Merits Review

Prior to proceeding to a consideration of the merits of Claim 6, the Court must first clarify which allegations of ineffectiveness are properly subject to merits review by this Court. When the Court determines that a claim for ineffective assistance of counsel is subject to merits review, such a determination does not call into question all conduct of the Petitioner's counsel during trial and sentencing. Rather, the scope of such review is limited to the specific allegations of deficiency which were exhausted in the state court proceedings. Coleman v. Thompson, 501 U.S. 722, 731 (1991); Carriger v. Lewis, 971 F.2d 329, 333-334 (9th Cir. 1992), cert. denied, 507 U.S. 992 (1993).

To properly exhaust state remedies, the petitioner must "fairly present" his claims to the state's highest court in a procedurally appropriate manner. Castille v. Peoples, 489 U.S. 346, 351 (1989). A claim is fairly presented if the petitioner has described the operative facts and the legal theories on which his federal habeas claim is based. Anderson v. Harless, 459 U.S. 4, 6 (1982). If a claim includes new factual allegations which were not presented to the state court and which fundamentally alter the legal claim already considered by the state court, a claim may be rendered unexhausted. Vasquez v. Hillery, 474 U.S. 254, 260 (1986).

If there are claims which have not been raised previously in state court, the federal court must determine whether the petitioner has state court remedies currently available to him. If there are none, the claims are "technically" exhausted. Jackson v. Cupp. 693 F.2d 867, 869 (9th Cir. 1982) (citing Engle v. Isaac, 456 U.S. 107, 125 n. 28

(1982)). However, before the Court may review a technically exhausted claim on the merits, the petitioner must demonstrate legitimate cause and actual prejudice to excuse his failure to raise the claims in state court, or show that a fundamental miscarriage of justice would result. Ordinarily "cause" to excuse a default exists if a petitioner can demonstrate that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Coleman, 501 U.S. at 753. "Prejudice" is actual harm resulting from the alleged constitutional error. Murray v. Carrier, 477 U.S. 478, 494 (1986). A fundamental miscarriage of justice would result if the petitioner is "innocent of the death sentence" or the petitioner is actually innocent of the capital crime.

**1. Ineffective Assistance of Counsel Claims Raised in Amended Memorandum.**

In his Amended Memorandum, Petitioner claims that his counsel failed to conduct a reasonable pretrial investigation and failed to present available mitigating evidence at sentencing. Specifically, Petitioner claims his counsel's conduct was deficient in the following respects:

(1) Counsel failed to contact other family members, including Petitioner's birth father, adoptive parents, and adoptive sister;

(2) Counsel failed to contact acquaintances and other officials who would have been willing to provide information;

(3) Counsel failed to present evidence indicating Petitioner suffers from organic brain damage;

(4) Counsel failed to present adequately mitigating psychiatric evidence concerning Petitioner's mental and emotional problems;

(5) Counsel failed to present adequate live testimonial evidence, expert and otherwise; and

(6) Counsel failed to present evidence by Petitioner's family and friends regarding Petitioner's personality, behavioral, and familial background.

(File doc. 91 at 81).

Petitioner states that had defense counsel contacted other family members, acquaintances, and officials, counsel would have obtained mitigating information relating to Petitioner's biological family, including any mental or physical disorders, dysfunctional lifestyles, Petitioner's biological mother's use of drugs and alcohol during her pregnancy, Petitioner's behavior as an infant, Petitioner's conduct as a child, and Petitioner's deportment as an adult. Id. Petitioner also states that many of those individuals were aware of Petitioner's drug use and other problems. Id.

Respondents urge that many of Petitioner's claims of deficient conduct on the part of defense counsel which Petitioner now raises in his Amended Memorandum are procedurally barred. Respondents assert that the Court's Order dated June 10, 1998, limited the merits review of Petitioner's sixth claim to the following questions:

(1) Was Petitioner's counsel ineffective for advising him not to cooperate with the probation officer?

(2) Was Petitioner's counsel ineffective for failing to explore additional grounds for arguing mitigation evidence; including the failure to contact Petitioner's biological father or adopted sister or failure to argue Petitioner's genetic propensity for violent conduct?

(File doc. 95 at 15). In order to clarify which of Petitioner's specific claims the Court held are available for merits review, the Court will review which specific claims it found were raised and exhausted in the state court.

### 2. Ineffective Assistance of Counsel Claims Raised and Exhausted in State Court.

Petitioner raised claims for ineffective assistance of counsel at two separate stages of the state court proceedings. On direct appeal, Petitioner claimed that his counsel's conduct was deficient in that counsel told the probation officer not to interview Petitioner for purposes of the aggravation/mitigation hearing. (Appellant's Opening Brief, p. 26). In his Petition for Post-Conviction Relief, Petitioner claimed that his counsel failed to contact Petitioner's biological father and adoptive sister, failed to present evidence that in an earlier conviction for second degree murder, Petitioner was acting in self-defense, and failed to explore additional grounds for arguing mitigation evidence. (R.O.A., Photostated Instruments, Item 137 at 13-14).

Petitioner contended that his adoptive sister would have verified that his adoptive mother was an alcoholic and that her alcoholism caused significant problems within the family unit which adversely affected Petitioner. Id. at 14. Petitioner also claimed that his adoptive sister would have provided additional information concerning family problems. Id.

Petitioner claimed that an investigation of his biological family would have revealed a long history of violent behavior and that his family's history of violence would have demonstrated his biological propensity for violence. Id. at 14-15. He further stated that his propensity for violence was greater in light of the fact that he was raised by an alcoholic mother in a dysfunctional home and the fact that his biological mother had used drugs and alcohol during her pregnancy. Id. at 15.

### 3. Ineffective Assistance of Counsel Claims Raised in First Amended Petition for Writ of Habeas Corpus.

In his First Amended Petition for Writ of Habeas Corpus, Petitioner's claims for ineffective assistance of counsel were raised in his sixth claim for relief. Petitioner alleged that his counsel's conduct was deficient in the following respects:

> (1) Counsel advised petitioner not to cooperate with the probation officer who prepared the presentence report;
>
> (2) Counsel allowed a mental health expert to examine Petitioner when counsel did not have the necessary documented social background information available for the expert to review before the examination;
>
> (3) Counsel would have identified mitigation evidence if counsel had reviewed Detective Chambers' report regarding Chambers' interview with Petitioner;
>
> (4) Counsel would have identified mitigation evidence if counsel had reviewed Dr. Potts' psychiatric evaluation; and
>
> (5) Counsel otherwise failed to present mitigation evidence.

(First Amended Petition pp. 28-29).

### 4. Claims Which Are Available for Merits Review

Based on the foregoing, the Court clarifies that the following claims of ineffective assistance of counsel are properly before this Court for review on the merits:

(1) Counsel's instruction to probation officer not to interview Petitioner in preparation for the aggravation/mitigation hearing;

(2) Counsel's failure to contact Petitioner's biological father and adoptive sister to aid counsel's investigation concerning evidence of mitigation;

(3) Counsel's failure to present mitigating evidence that Petitioner's earlier conviction for second degree murder was the result of a homicide in which Petitioner was acting in self-defense;

(4) Counsel's failure to investigate and present other evidence of mitigation, including the failure to present evidence of the following:

(a) The alcoholism of Petitioner's adoptive mother;

(b) His adoptive family's dysfunctional nature;

(c) His biological family's violent history; and

(d) His biological mother's use of drugs and alcohol during her pregnancy.

The remaining allegations of ineffective assistance of counsel were not fairly presented to the state court. If Petitioner were to return to state court, those allegations would be precluded pursuant to Ariz.R.Crim.P. 32.2(a)(3), and they are technically exhausted. Petitioner has failed to demonstrate cause or prejudice for his failure to present these allegations to the state court, nor has he demonstrated that a fundamental miscarriage of justice will occur if the Court does not review those allegations. The Court therefore limits its review of Petitioner's Sixth Claim for Relief to the four enumerated allegations, including subparts (a) through (d) of allegation four, listed above.

## B. Review on the Merits

### 1. Factual Background

At the presentence hearing on October 25, 1990, Petitioner declined to present evidence of mitigation. Petitioner's defense counsel explained to the sentencing judge that Petitioner did not want to present mitigating evidence, stating as follows:

> MR. FARRELL: . . . Mr. Landrigan has made it clear to me — Jeffrey, the defendant — that he does not wish anyone from his family to testify on his behalf today.
>
> * * *
>
> MR. FARRELL: Basically it's at my client's wishes, Your Honor. I told him that in order to effectively represent him, especially concerning the fact that the State is seeking the death penalty, any and all mitigating factors, I was under a duty to disclose those factors to this Court for consideration regarding the sentencing. He is adamant he does not want any testimony from his family, specifically these two people that I have here, his mother, under subpoena, and as well as having flown in his ex-wife.
>
> I have advised him and I have advised him very strongly that I think it's very much against his interests to take that particular position. I have also advised both the witnesses I could have them sworn in and ask them questions, but they are under an obligation to do what they feel is right, Your Honor. They are looking after Jeff's interest.
>
> I'm coming from the position that I have to bring certain evidence before this Court. I'm at a loss. I don't know what this Court wishes to do.

(R.T. 10/25/90 at 3-4). The court then engaged in the following colloquy with Petitioner:

THE COURT: Mr. Landrigan, have you instructed your lawyer that you do not wish for him to bring any mitigating circumstances to my attention?

THE DEFENDANT: Yeah.

THE COURT: Do you know what that means?

THE DEFENDANT: Yeah.

THE COURT: Mr. Landrigan, are there mitigating circumstances I should be aware of?

THE DEFENDANT: Not as far as I'm concerned.

(R.T. 10/25/90 at 4). The court then proceeded with the hearing.

Petitioner's counsel intended to call Petitioner's ex-wife, Sandra Landrigan, to testify as to mitigating circumstances. Sandra Landrigan indicated that she would not testify because Petitioner had asked her not to do so. (R.T. 10/25/90 at 5). Petitioner's counsel proffered that he would have elicited testimony from Sandra Landrigan relating to her relationship with Petitioner, his history of substance abuse, his child, what type of father and spouse he was, that he was a responsible person, and that he was a loving and caring husband. (R.T. 10/25/90 at 6-7). Petitioner's counsel also expected Sandra Landrigan to testify about the details of Petitioner's previous second degree murder conviction, including the fact that the aggression was initiated by the victim and the Petitioner was defending himself. (R.T. 10/25/90 at 8-10.) Petitioner then contradicted this proffered version of the facts relating to the prior murder conviction by claiming that the Petitioner, not the victim, had been the initial aggressor. (R.T. 10/25/90 at 11-12).

Petitioner's counsel also intended to call Petitioner's biological mother, Virginia Gipson, to testify as to mitigating evidence. (R.T. 10/25/90 at 2-3). Petitioner's counsel proffered that he would have

elicited testimony from Virginia Gipson relating to factors which might have affected her pregnancy, including her use of drugs during the pregnancy. (R.T. 10/25/90 at 13-14). Petitioner's counsel then stated that he planned to substantiate Ms. Gipson's testimony with expert testimony regarding the neurological and antisocial effects of drug usage on an unborn fetus. (R.T. 10/25/90 at 14-15).

Later in the hearing, the Court asked Petitioner if he had anything to say on his own behalf. (R.T. 10/25/90 at 21). Petitioner responded as follows:

> THE DEFENDANT: Yeah. I'd like to point out a few things about how I feel about the way this shit, this whole scenario went down. I think that it's pretty fucking ridiculous to let a fagot be the one to determine my fate, about how they come across in his defense, about I was supposedly fucking this dude. This never happened. I think the whole thing stinks. I think if you want to give me the death penalty, just bring it right on. I'm ready for it.

(R.T. 10/25/90 at 21-22).

**2. Ineffective Assistance of Counsel — Improper Advice to Probation Officer**

On direct appeal, Petitioner claimed that his defense counsel was ineffective for improperly instructing the probation officer not to interview Petitioner. (Appellant's Opening Brief at 26-27). The Arizona Supreme Court held that the defense counsel's instruction to the probation officer "was clearly within the wide range of professionally competent assistance, given defendant's stated desire not to have mitigating evidence presented in his behalf, and his tendency to volunteer damaging statements like those made to the trial judge at the hearing." State v. Landrigan, 176 Ariz. at 8, 859 P.2d at 118. In this Court, Petitioner has not argued his claim that the instruction to the probation officer constituted ineffective assistance

of counsel in either his memorandum or reply on the merits. This constitutes abandonment of this claim as a source of ineffective assistance of counsel. See United States v. Vought, 69 F.3d 1498, 1501 (9th Cir. 1995) (failure to address claim in appellate brief is abandonment of claim).

### 3. Ineffective Assistance of Counsel — Failure to Discover and Present Mitigation Evidence

In his Petition for Post-Conviction Relief, Petitioner claimed that his counsel was ineffective regarding his proffer of mitigation evidence at the presentence hearing and his failure to investigate and present additional mitigation evidence on Petitioner's behalf. In their response, Respondents argued that Petitioner waived any claim of ineffective assistance of counsel by expressly instructing his defense counsel not to present mitigating evidence.[5]

(R.O.A., Photostated Instruments, Item 138 at 5). The Rule 32 court found and ruled as follows:

> Since defendant instructed his attorney not to present any evidence at the sentencing hearing, it is difficult to comprehend how defendant can claim counsel should have presented other evidence at sentencing. . . . Since the defendant instructed his attorney not to bring any mitigation to the attention of the court, he cannot now claim counsel was ineffective because he did not "explore additional grounds for arguing mitigation evidence".

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5. It is important to note that the sentencing judge did consider the defense attorney's proffer and accepted it as true for purposes of sentencing. (R.T. 10/25/90 at 30). However, the proffer was limited to the two witnesses whom the defense attorney intended to examine if Petitioner had not objected. The proffer did not include any other mitigating evidence which may have been discovered through additional investigation.

(M.E. of 7/17/95 at 3-4). The Rule 32 court impliedly ruled that Petitioner's trial counsel behaved reasonably by failing to introduce additional mitigation evidence given Petitioner's instruction to counsel. The initial question presented is whether the Rule 32 court's implicit determination that Petitioner's trial counsel acted reasonably was "an unreasonable application of controlling Supreme Court precedent" or "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" such that Petitioner is entitled to habeas relief. 28 U.S.C. §§ 2254(d)(1)&(2).

The Court finds that even if the Rule 32 court's determination that Petitioner's counsel acted reasonably involved an unreasonable application of controlling Supreme Court precedent or was an unreasonable determination of facts in light of the evidence presented, Petitioner has failed to demonstrate he was prejudiced by his trial counsel's alleged failure to discover and present mitigation evidence. The Court expanded the record to include numerous affidavits and other evidence which Petitioner claims to be mitigating, including, inter alia, evidence of Petitioner's troubled background, his history of drug and alcohol abuse, and his family's history of criminal behavior. The Court has reviewed the expanded record *de novo* and concludes that Petitioner has failed to demonstrate a reasonable probability that the result of the proceeding would have been different if his trial counsel had discovered and presented the evidence he claims should have been discovered and presented in mitigation. See Strickland, 466 U.S at 694. He has failed to show that there is a "reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Id. at 695. The Court will thus deny Petitioner's request for relief on Claim 6.

**Claim 7: Petitioner's rights to have a jury determine the existence of mitigating circumstances and take part in the sentencing decision, as guaranteed by**

**the Sixth and Fourteenth Amendments.**

Petitioner claims his rights under the Sixth and Fourteenth Amendments were violated in that the trial judge, rather than the jury, made the factual determinations requisite to the imposition of his death sentence as well as the ultimate determination of sentence. Petitioner assserts that under the circumstances presented in this case, the Court should disregard the ruling in Walton v. Arizona, 497 U.S. 639 (1990), which upheld the Arizona capital punishment sentencing scheme. The Supreme Court in Walton specifically held that sentencing by the judge rather than the jury in capital cases is not unconstitutional, and "'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." 497 U.S. at 647-48, citing Hildwin v. Florida, 490 U.S. 638, 640-641 (1989) (per curiam). The Court declines Petitioner's invitation to disturb the clearly established law of Walton, and thus will deny Petitioner's Seventh Claim for Relief.

Petitioner cites Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215 (1999), and urges this Court to revisit and "reexamine Walton." It is true, as Petitioner states, that the Jones decision questions the constitutional soundness of the Walton decision.[6] Justice Stevens, in his concurrence, and the Chief Justice, Justices Kennedy, O'Connor, and Breyer, in their dissent, expressly noted the doubt case on the Walton opinion by the Jones decision. 526 U.S. at ___, 119 S.Ct. at 1229, 1238. Justice Kennedy further noted, however, that although the Walton decision should be reconsidered, it was not necessary to do so in joining in the opinion of the Court. Id., 526 U.S. at __, 119 S.Ct. at 1229.

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6. It should be noted that the facts in Jones dealt with the statutory interpretation of a federal carjacking statute and did not involve any interpretation of capital sentencing under federal habeas review.

Without reaching the issue whether Petitioner's assertion is Teague-barred, the Court finds that it does not have the authority to overrule the clearly established Supreme Court law as set forth in Walton. The reconsideration of Walton was not required in Jones, nor did a thorough reconsideration of Walton take place. The Walton decision has not been overruled by the Supreme Court, and unless it is, Walton is the clearly established Supreme Court law for purposes of habeas review under § 2254(d).

**Claim 8: The trial court's failure to consider evidence of mitigation offered at trial and the Arizona Supreme Court's failure to consider evidence of mitigation in its independent review violated Petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights.**

In his Eighth Claim for Relief, Petitioner claims:

> The trial court's failure to consider evidence of mitigation offered at trial and the Arizona Supreme Court's failure to consider evidence of mitigation in its independent review violated Petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

In a capital case, a sentencing judge may not refuse to consider, as a matter of law, any relevant mitigating evidence. Eddings v. Oklahoma, 455 U.S. 104, 113-114 (1982); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion). Nor may the court confine its consideration of mitigating evidence to the mitigating factors listed in a state statute. Hitchcock v. Dugger, 481 U.S. 393, 399 (1987). The primary concern is "that the sentencing decision be based on the facts and circumstances of the defendant, his background, and his crime." Clemons v. Mississippi, 494 U.S. 738, 748 (1990). The sentencing judge "must consider all relevant mitigating evidence and weigh it

against the evidence of the aggravating circumstances." Eddings, 455 U.S. at 117. The sentencing judge "may determine the weight to be given relevant mitigating evidence," but the judge may not give it no weight by excluding such evidence from the judge's consideration." Id. at 115. However, "the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense" continues to exist. Lockett, 438 U.S. at 604, n. 12.

Ninth Circuit case law is instructive concerning what constitutes a reasonable application of Eddings for purposes of the AEDPA. When considering mitigation evidence, the sentencing judge "is free to assess how much weight to assign to such evidence[.]" Ortiz v. Stewart, 149 F.3d 923, 943 (9th Cir. 1998), cert. denied, __ U.S. __, 119 S.Ct. 1777 (1999). The trial court is not required to "itemize and discuss every piece of evidence offered in mitigation." Jeffers v. Lewis, 38 F.3d 411, 418 (9th Cir. 1994) (en banc), cert. denied, 514 U.S. 1071 (1995). It must be simply be clear that the court considered all mitigating evidence which was offered. Id. A finding that there are "no mitigating circumstances" does not violate the Constitution. Ortiz, 149 F.3d at 943. "It is sufficient that a sentencing court state that it found no mitigating circumstances that outweigh the aggravating circumstances." Poland v. Stewart, 117 F.3d 1094, 1101 (9th Cir. 1997), cert. denied, __ U.S. __, 118 S.Ct. 1533 (1998). In Ortiz, 149 F.3d at 943, the trial court found that "after considering all of these factors there are no mitigating circumstances sufficiently substantial to call for leniency." (internal quotes omitted). There was no refusal to consider mitigating evidence by the trial court. Id. Rather, the court considered the mitigating evidence "and found it inadequate to justify leniency." Id.

State appellate courts are not required to reweigh the mitigating and aggravating circumstances when errors have occurred in a capital sentencing proceeding. Clemons, 494 U.S. at 754. Nevertheless, several states, otherwise known as "weighing states," have chosen this method for reviewing capital sentencings. "[I]n a 'weighing' state such as Arizona, when a trial court bases its decision to impose a

death sentence on both valid and invalid aggravating factors, a state appellate court can affirm the sentence only after performing a harmless-error review, or reweighing the mitigating evidence against the remaining valid aggravating factors." Jeffers, 38 F.3d at 414 (citing Clemons, 494 U.S. at 741.). Upon review, it must be determined that the state appellate court actually reweighed the mitigating and aggravating circumstances. Richmond v. Lewis, 506 U.S. 40, 48 (1992). A mere recitation by the appellate court that it has weighed the mitigating circumstances against the aggravating circumstances is insufficient. Jeffers, 38 F.3d at 422 (citing Clemons, 494 U.S. at 744). If the appellate court applied the proper standard of review, then Petitioner will not be entitled to habeas relief on this claim. Clemons, 494 U.S. at 748-749.

**A. The trial court's alleged failure to consider mitigation evidence.**

Petitioner claims that the sentencing court erred by refusing to consider a number of different mitigating factors. He claims that the sentencing court "simply dismissed the remaining proffered statements concerning evidence of mitigation. . . . limit[ing] the proffered mitigation to Landrigan's mental state at the time of the crime." Id.

Petitioner's assertion appears, in part, to be correct. To the extent Petitioner argues that the trial court failed to consider evidence of Petitioner's "respectful demeanor during trial" or his difficult family history, the Court disagrees. The trial court expressly found that Petitioner did not have a difficult family history. (M.E. of 10/25/90 at 4-5). In addition, the trial court stated that "although the defendant may have been respectful and proper during trial, his demeanor at sentencing was not," and the trial court determined that there was no mitigation evidence of "respectful demeanor." Id. The Court will not disturb these factual determinations, which are supported by the record and which Petitioner has failed to rebut by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). However, to the extent Petitioner argues that the trial court failed to consider evidence of

Petitioner's intoxication at the time of the offense[7] or his history of drug and alcohol abuse as nonstatutory mitigation circumstances, the Court agrees. Respondents admitted as much on direct appeal, where they stated:

> [Petitioner] proffered his purported alcohol and drug abuse solely in the context of A.R.S. § 13-703(G)(1), claiming that it impaired his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. . . .[Petitioner] did not proffer his purported alcohol and drug abuse as a nonstatutory -- character -- mitigating circumstance. As previously noted, the eighth and fourteenth amendments prohibit only the preclusion or refusal to consider proffered mitigation. . . . Since [Petitioner] did not proffer his purported alcohol and drug abuse as nonstatutory "character" mitigation, the trial court did not improperly "restrict" consideration of the proffered mitigation.

(Appellee's Answering Brief at 40).[8]

Petitioner proffered mitigating evidence concerning his drug and alcohol use. In his Sentencing Memorandum Concerning Mitigation ARS § 13-703(G)[9], Petitioner raised, inter alia, "the following aspects

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7. The trial court's failure to consider Petitioner's intoxication at the time of the offense was cured by the Arizona Supreme Court's consideration of that evidence. See infra.

8. Respondents have since argued that the trial court "discussed and considered *every* proffered mitigating circumstance." (File doc. 95 at 24). They do not contend, however, that the trial court weighed all mitigating circumstances against the aggravating circumstances, as was required.

9. A.R.S. § 13-703(G) provides in pertinent part:

> Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the

(continued...)

of his character, propensities, record, and the following circumstances of the offense, as mitigating evidence sufficiently substantial to call for leniency:"

(1) Petitioner's ingestion of drugs and alcohol prior to the murder; and

(2) Petitioner's long history of drug and alcohol abuse.

(R.O.A., Photostated Instruments, Item 91). Specifically, Petitioner proffered the following mitigating circumstances relating to drug and alcohol use:

(1) Petitioner and the victim were drinking alcohol, smoking marijuana, and taking drugs at the victim's apartment;

(2) Petitioner has a long history of substance abuse concerning alcohol and drugs; and

(3) Petitioner's intoxication on the night the victim was killed substantially impaired his ability to appreciate the wrongfulness of his conduct.

(R.O.A., Photostated Instruments, Item 91 at 6-8). In addition, Petitioner attached two exhibits to his Sentencing Memorandum which demonstrated that Petitioner started drinking at the age of thirteen and was admitted at age seventeen to an Alcohol Treatment Program at St. Johns Hospital in Tulsa, Oklahoma. Id. at Exhibit B. At the presentence hearing, Petitioner's attorney proffered that Petitioner

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9. (...continued)
offense, including but not limited to the following:

4. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution. . . .

met his wife at a substance abuse rehabilitation center. (R.T. of 10/25/90 at 6). The Presentence Investigation prepared by the probation officer also demonstrated that Petitioner had a history of drug and alcohol abuse:

> The defendant apparently has a history of alcohol and amphetamine abuse. The defendant's Oklahoma Department of Corrections records also show that he had a number of disciplinary actions for possession of a controlled substance while in custody.

(R.O.A., Photostated Instruments, Item 95 at 5).

When weighing the mitigating circumstances against the aggravating circumstances at the presentence hearing, the trial court stated as follows:

> After weighing and considering the aggravating circumstances that the defendant had two prior felony convictions involving the use of violence on another person and committed the offense with the expectation of pecuniary gain, and considering the mitigating circumstances of love of family, love of his family for him, . . . and no premeditation . . . I find that the mitigating circumstances do not outweigh the aggravating circumstances.

(R.T. of 10/25/90 at 33). In weighing the mitigating circumstances against the aggravating circumstances during the presentence hearing, the trial court did not consider mitigating circumstances relating to Petitioner's intoxication at the time of the offense or his history of drug and/or alcohol abuse. The trial court then sentenced Petitioner to death. Id. at 34.

At the hearing, the trial court concluded that Petitioner's proffered evidence of his drug or alcohol intoxication at the time of the offense did not satisfy the requirements of A.R.S. § 13-703(G)(1). The trial court stated as follows:

> The defendant's state of intoxication has been alleged as a mitigating circumstances (sic) under element (G)(1), that the defendant's capacity to appreciate the wrongfulness of his conduct and his ability to conform his conduct to the requirements of law was (sic) significantly impaired, but not so impaired as to constitute a defense to prosecution. In the sentencing memorandum it is argued that evidence was presented at trial that the defendant drank quite a bit, smoked marijuana and did drugs. I do not recall any testimony about drinking or drug use.[10] I do recall some evidence regarding the use of marijuana. However, no evidence has been presented to show that the apparent use of marijuana affected the defendant's capacity to appreciate the wrongfulness of his conduct or impaired his ability to conform his conduct to the requirements of law. Additionally, drug or alcohol intoxication, in and of itself, is not a mitigating circumstance.

(R.T. of 10/25/90 at 28-29).

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10. In fact, there was testimony regarding drinking and drug use prior to the murder, which the Arizona Supreme Court recognized. A witness at trial testified concerning a telephone conversation he had with the victim on the evening of the murder:

> A We discussed he had gone down to pick up some beer and picked up a guy named Jeff and brought Jeff back to the apartment so they could drink some beer and smoke some joints. . . .
>
> Q What did he say about Jeff?
>
> A That he had picked Jeff up at a Burger King and that he was the same Jeff that he had told me about prior and they were getting drunk, or they were drinking and wanted to know if I was going to come over.

(R.T. of 6/19/90 at 49). The same witness testified earlier that the victim was a drinker and drank "a 12-pack a day, five days a week," and every time the victim would start drinking beer he would get drunk. (Id. at 46). He further testified that the victim was intoxicated at the time of the phone call. (Id. at 66). Police found a bong in the apartment and surmised it was used to smoke marijuana. (Id. at 110).

The trial court also entered a written sentencing order. (M.E. of 10/25/90). In addition to finding that two aggravating circumstances were proven beyond a reasonable doubt, the trial court stated:

> The defendant alleged A.R.S. § 13-703(G)(1) as a mitigating circumstance. Assuming, intoxication and/or drug use (although not demonstrated) and defendant's predisposition to addiction based upon his mother's use of drugs during pregnancy, the defendant has failed to show by even slight evidence that any or all of the factors diminished or to the slightest degree diminished the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of the law. . . .

Id. at 4-5.

The trial court's determination that Petitioner's use of drugs or alcohol did not impair Petitioner's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law is a finding of fact which the Court will not disturb. See 28 U.S.C. § 2254(e)(1). However, the trial court's determination that such evidence was not mitigating evidence under § 13-703(G)(1) did not excuse the trial court from considering that evidence as non-statutory mitigation when weighing the mitigating and aggravating circumstances. See Smith v. Stewart, 140 F.3d 1263, 1271 (9th Cir.), cert. denied, __ U.S. __, 119 S.Ct. 336 (198) (long use of drugs could have mitigating effect and must be considered as nonstatutory mitigating factor even if it does not satisfy § 13-703(G)(1).

The trial court concluded that "drug or alcohol intoxication, in and of itself, is not a mitigating circumstance." Petitioner's intoxication by drugs or alcohol, if any, at the time of the offense is relevant evidence bearing on the circumstances of the offense and should have been considered at mitigating evidence. Cf. Lockett, supra; A.R.S. § 13-703(G). In addition, Petitioner's history of drug or alcohol abuse is relevant mitigating character evidence. Smith v. Stewart,

140 F.3d at 1271; cf. Eddings, supra; Lockett, supra. The trial court was entitled to give as little or as much weight to such evidence as it found appropriate, but it was not entitled to exclude that evidence from consideration altogether. The trial court's failure to consider Petitioner's intoxication by drugs and/or alcohol at the time of the offense, and its failure to consider Petitioner's history of drug and/or alcohol abuse, was contrary to the clearly established Supreme Court law of Eddings, Lockett, and Hitchcock, supra.

**B. Arizona Supreme Court's alleged failure to conduct proper independent review**

The fact that the trial court failed to consider relevant mitigation evidence does not necessarily indicate that Petitioner is entitled to habeas relief. Because the Arizona Supreme Court conducts an independent review of capital sentencing determinations, any errors committed by the sentencing judge can be cured on direct appeal.

On direct appeal, the Arizona Supreme Court stated as follows:

> We have independently reviewed the record to determine the presence or absence of aggravating and mitigating circumstances, and the propriety of the death penalty. State v. Richmond, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976). Defendant claims the record does not support a finding that the murder was committed with the expectation of the receipt of anything of pecuniary value, pursuant to A.R.S. § 13-703(F)(5).
>
> We disagree. Not only is the actual receipt of money or valuables not required to find the expectation of pecuniary gain, State v. LaGrand, 153 Ariz. 21, 36, 734 P.2d 563, 576 (1987), but here defendant was convicted of theft and burglary on evidence we have deemed sufficient. Defendant admitted he was getting money by robbing. The victim, who was pursuing defendant as a sexual partner, was an obvious target. The apartment was ransacked. The killing hardly appears to

have been unexpected or accidental. See State v. Nash, 143 Ariz. 392, 405, 694 P.2d 222, 235 (1985) (unexpected or accidental death during course of or flight from robbery will not support aggravating circumstance of pecuniary gain). Physical and testimonial evidence supports the finding that pecuniary consideration was a cause, not merely a result, of the murder. LaGrand, 153 Ariz. at 35, 734 P.2d at 577 ("When the defendant comes to rob, the defendant expects pecuniary gain and this desire infects all other conduct of the defendant").

> The record also supports the finding of a second aggravating circumstance, that defendant previously was convicted of a felony involving the use or threat of violence on another person under A.R.S. S 13-703(F)(2). See Okla.Stat. tit. 21, SS 641, 642, 645 (1971) (assault and battery with a dangerous weapon). Defendant on appeal does not contest this finding. The state produced certified public records from Oklahoma, and its expert matched defendant's fingerprints with those on the records.
>
> We also agree that the record does not present mitigating evidence sufficiently substantial to call for leniency. The trial judge properly rejected defendant's suggestion that intoxication was a mitigating circumstance under A.R.S. S 13-703(G)(1). The only evidence on this subject was testimony from the friend who said the victim called and told him that he and Jeff were drinking beer. There was no evidence that defendant was impaired, that he did not have the capacity to appreciate the wrongfulness of his conduct, or that he could not conform his conduct to the requirements of the law.

State v. Landrigan, 176 Ariz. at 6-7, 859 P.2d at 116-117.

The Arizona Supreme Court's recitation that it "independently reviewed the record to determine the presence or absence of aggravating and mitigating circumstances, and the propriety of the death penalty" is pertinent, but not dispositive. Although it is clear

that the Arizona Supreme Court independently determined the existence of two aggravating circumstances, it does not appear that it considered the proffered mitigating evidence as nonstatutory mitigating evidence. Rather, it agreed with the sentencing court that Petitioner's intoxication at the time of the incident was not statutory mitigating evidence under A.R.S. § 13-703(G) "sufficiently substantial to call for leniency." Id. at 7, 859 P.2d at 117. The Arizona Supreme Court did not address the argument raised in Petitioner's direct appeal brief that the sentencing court improperly failed to consider and weigh evidence of mitigation, nor did it address whether Petitioner's history of drug and alcohol abuse should have been considered as nonstatutory mitigating factors. Instead, it appears the Arizona Supreme Court accepted the argument set forth in the Appellee's Answering Brief that "[s]ince appellant did not proffer his purported alcohol and drug abuse as nonstatutory 'character' mitigation, the trial court did not improperly 'restrict' consideration of the proffered mitigation." (Appellee's Answering Brief at 40). The Court finds that the Arizona Supreme Court did not "[conduct] appellate reweighing as [the Court] understand[s] the concept." Clemons, 494 U.S. at 752.

**C. Remedy**

The question becomes one of remedy. The appropriate standard of review is harmless error review. See Hitchcock v. Dugger, 481 U.S. 393, 1824 (1987); Bryson v. Ward, 187 F.3d 1193, 1205 (10th Cir. 1999); Boyd v. French, 147 F.3d 319, 327 (4th Cir. 1998), cert. denied, ___ U.S. ___, 119 S.Ct. 1050 (1999); Sweet v. Delo, 125 F.3d 1144, 1158 (8th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 1197 (1998); Demps v. Dugger, 874 F.2d 1385, 1389-90 (11th Cir. 1989), cert. denied, 494 U.S. 1090 (1990) (pre-Brecht). An error is not harmless if it "had substantial and injurious effect or influence in determining" the sentence. Brecht v. Abrahmson, 507 U.S. 619, 623 (1993).

'"Review for harmless error requires not only an evaluation of the remaining incriminating evidence in the record, but also the most

perceptive reflections as to the probabilities of the effect of error on a reasonable trier of fact'" United States v. Garibay, 143 F.3d 534, 539 (9th Cir. 1998) (citing United States v. Harrison, 34 F.3d 886, 892 (9th Cir. 1994)). "Highly significant is the nature of the information and its connection to the case." Mach v. Stewart, 137 F.3d 630, 634 (9th Cir. 1998). "Where the record is so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness of an error, the error is not harmless and relief should be granted." Jeffries v. Wood, 114 F.3d 1484, 1489 (9th Cir.), cert. denied, ___ U.S. ___, 118 S.Ct. 586 (1997). "Petitioner must establish that there is a reasonable probability that life imprisonment would have been imposed had the error(s) not occurred." Davis v. Singletary, 853 F.Supp. 1492, 1581 (M.D.Fla. 1994), aff'd, 119 F.3d 1471 (1997), cert. denied, ___ U.S. ___, 118 S.Ct. 1848 (1998). "Nonstatutory mitigating evidence not considered by the [sentencer] affects the [sentencer's] recommendation if it amounts to a significant mitigating circumstance." Jackson v. Dugger, 931 F.2d 712, 716 (11th Cir.), cert. denied, 502 U.S. 973 (1991) (cites omitted).

The Court finds that the failure of the sentencing judge and the Arizona Supreme Court to consider Petitioner's alleged history of drug and alcohol abuse as a mitigating circumstance did not have a substantial and injurious effect on the sentence. The Court has reviewed the evidence in the expanded record attesting to Petitioner's history of drug and alcohol abuse, including numerous declarations by family, friends, and neighbors. For example, the Court has considered the declaration by Petitioner's adoptive sister, Shannon Sumter, who states that Petitioner started "doing drugs when he was pretty young," that Petitioner's "behavior was exaggerated by his drug use," and that he came close to death many times because of drug overdoses and alcohol abuse. (File doc. 90, Exh. 17). The Court has also considered the declaration by Petitioner's childhood friend, Robert Forrest, who states that Petitioner was introduced to drugs during junior high school, and that by 1978, Forrest and Petitioner were taking "cocaine and crystal" and Petitioner was into "meth." (Id., Exh. 20). In addition, the Court has considered the

declaration by Petitioner's former wife, Sandra Martinez, who states that she smoked marijuana with Petitioner when they were young teenagers, and when they were in their late teens, they met again at a drug rehabilitation center. (Id., Exh. 27).

Having considered the aggravating and mitigating circumstances found by the trial court, and having considered Petitioner's alleged history of drug and alcohol abuse as a mitigating circumstance, the Court finds that Petitioner has failed to establish a reasonable probability that life imprisonment would have been imposed by a reasonable trier of fact had the errors not occurred. If a reasonable trier of fact had considered Petitioner's history of drug and alcohol abuse as a mitigating circumstance while weighing the mitigating circumstances against the aggravating circumstances, that trier of fact would not have concluded that the mitigating circumstances were sufficiently substantial to call for leniency. The Court will thus deny Petitioner's request for habeas relief on Claim 8.

**Claim 10: The consideration of victim impact evidence violated Petitioner's rights under the Eighth and Fourteenth Amendments.**

Petitioner alleges that the trial court unconstitutionally considered victim impact evidence prior to imposing sentence in violation of Booth v. Maryland, 482 U.S. 496 (1987), overruled in part by Payne v. Tennessee, 501 U.S. 808 (1991). In particular, Petitioner claims that two statements contained in the presentence report, one by the brother of the victim and one by a police officer, were improperly admitted for the trial court's consideration prior to the imposition of sentence. Those two statements are as follows:

> (1) "Charles Dyer, the victim's brother, advised this officer that he felt the defendant deserved the death penalty. He further related that the man killed someone and it does not matter whose brother was the victim."

(2) "Detective Chambers advised this officer that he does not have a great deal of compassion for the defendant. He further related he could not think of anything mitigating in this case and believes the defendant should get a maximum sentence."

In Booth, 482 U.S. at 509, the Supreme Court held that the introduction of a victim impact statement during the sentencing phase of a capital case violated the Eighth Amendment. In Payne v. Tennessee, 501 U.S. at 831, the Supreme Court revisited Booth and overruled it in part. In Payne, the Court held that the Eighth Amendment does not erect a *per se* barrier to the admission of victim impact evidence. Id. (O'Connor, J., concurring). The Payne ruling did not disturb the Booth holding *vis a vis* the inadmissibility of characterizations and opinions from the victim's family about the crime, the defendant, or the appropriate sentence to be imposed. Id. at n. 2. In response to the concerns of Booth, the Payne Court held that "[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." 501 U.S. at 825.

In the present case, the Court finds that the Superior Court's ruling was not contrary to, nor constituted an unreasonable application of, Booth or Payne, supra. In Arizona, the trial judge, rather than a jury, determines the penalty in a capital case. A.R.S. § 13-703. "Trial judges are presumed to know the law and to apply it in making their decisions." Walton v. Arizona, 497 U.S. at 653. In its July 17, 1995, Order, the Rule 32 court stated:

It is assumed the trial court considers only relevant information and disregards anything irrelevant or inflammatory from victims in the presentence report. State v. Michael Apelt, 176 Ariz. 349, 359, 861 P.2d 634 (1993). Defendant has not shown that the statements of the victim's family were considered by the trial court.

(M.E. of 7/17/95 at 5).[11] The Court will thus deny Petitioner's Tenth Claim for Relief.

**Claim 11: The statutory provisions governing the Arizona capital punishment scheme violate the Fifth, Sixth, Eighth and Fourteenth Amendments.**

In his Amendment Memorandum, Petitioner raises the following challenges to the Arizona statutes governing capital punishment:

> (1) By requiring mitigating evidence to meet a threshold for qualification, the statutes impose an unconstitutional barrier to the consideration of mitigating evidence;
>
> (2) The statutes fail to genuinely narrow the class of persons eligible for the death penalty and fail to provide for meaningful proportionality review;
>
> (3) The mandatory death sentence, which must be imposed if there are statutory aggravating circumstances and no mitigating circumstances sufficient to warrant leniency, results in an arbitrary and irrational death sentence; and
>
> (4) The death penalty is a cruel and unusual punishment.

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11. Ninth Circuit caselaw also suggests that the trial court's decision was not an unreasonable application of Booth or Payne. "[I]n the absence of any evidence to the contrary, [the Court] must assume that the trial judge properly applied the law and considered only the evidence he knew to be admissible." Gretzler v. Stewart, 112 F.3d 992, 1009 (9th Cir. 1997), cert. denied, 522 U.S 1081 (1998). Because Petitioner has presented no evidence that the sentencing court improperly considered victim impact evidence, he has failed to defeat the presumption that the trial court properly applied the law.

The Court will address each of these four claims in turn.

### A. Threshold for Mitigation Evidence

Petitioner claims that it is unconstitutional to require persons convicted of a capital offense to prove there is mitigating evidence sufficiently substantial to call for leniency before such evidence will be considered. Petitioner has misunderstood the effect of the Arizona statute. The statute does not provide a threshold qualification of "consideration" of mitigating evidence. Rather, it requires the court to consider all relevant mitigating evidence and then determine whether the evidence, when weighed against the aggravating factors, is sufficiently substantial to call for leniency. The Constitution requires no more. Walton v. Arizona, 497 U.S. 639, 649-650, 674-675 (1990); see also Eddings v. Oklahoma, 455 U.S. 104, 113-114, (1982); Penry v. Lynaugh, 492 U.S. 302, 318 (1989). The Court will therefore deny Petitioner's request for relief on this aspect of his Eleventh Claim for Relief.

### B. Death Eligibility Classification and Proportionality Review

In Furman v. Georgia, 408 U.S. 238 (1972), the United States Supreme Court held the death penalty statutes of Georgia and Texas were unconstitutional because they allowed arbitrary and unguided imposition of capital punishment. Furman caused many states to enact new capital statutes. A number of these statutes survived the Supreme Court's further guidance in Gregg v. Georgia, 428 U.S. 153 (1976). Observing that the death penalty is "unique in its severity and irrevocability," Gregg, 428 U.S. at 187, the Supreme Court concluded that a death sentence may not be imposed unless the sentencing authority focuses its attention "on the particularized nature of the crime and the particularized characteristics of the individual defendant." 428 U.S. at 206. In doing so, a court must find the presence of at least one aggravating factor and then weigh that factor against the evidence of mitigating factors. Id. at 206. The Supreme Court refined these general requirements in Zant v. Stephens, 462

U.S. 862, 877 (1983), holding that in order for a capital sentencing scheme to pass constitutional muster it must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of" the capital crime. A death penalty scheme must provide an "objective, evenhanded and substantively rational way" for determining whether a defendant is eligible for the death penalty. Zant, 462 U.S. at 879.

In addition to the requirements for determining eligibility for the death penalty, the Supreme Court has imposed a separate requirement for the selection decision, "where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence." Tuilaepa v. California, 512 U.S. 967, 972 (1994). "What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime." Zant, 462 U.S. at 879. Accordingly, a statute which "provides for categorical narrowing at the definition stage, and for individualized determination and appellate review at the selection stage" will ordinarily meet Eighth Amendment and Due Process concerns, 462 U.S. at 879, so long as a state ensures "that the process is neutral and principled so as to guard against bias or caprice." Tuilaepa, 512 U.S. at 973.

Defining specific "aggravating circumstances" is the accepted "means of genuinely narrowing the class of death-eligible persons and thereby channeling the [sentencing authority's] discretion." Lowenfield v. Phelps, 484 U.S. 231, 244 (1988). Such a circumstance must meet two requirements. First, "the [aggravating] circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder." Tuilaepa, 512 U.S. at 972; *see* Arave v. Creech, 507 U.S. 463, 474 (1993). Second, "the aggravating circumstance may not be unconstitutionally vague." Tuilaepa, 512 U.S. at 972; see Arave, 507 U.S. at 473; Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

Petitioner contends that Arizona's capital sentencing scheme generally fails to narrow the class of those eligible for capital punishment. The Court disagrees. Arizona's death penalty statute allows only certain, specific aggravating circumstances to be considered in determining eligibility for the death penalty. A.R.S. § 13-703(F). In the case at hand, the sentencing court found two aggravating circumstances: first, that Petitioner was previously convicted of felonies involving the use or threat of violence on another person, specifically murder in the second degree and assault and battery with a deadly weapon, § 13-703(F)(2); and second, that the jury found Petitioner guilty of burglary and theft and that the Petitioner committed the offense with the expectation that he would receive something of pecuniary value, § 13-703(F)(5).[12] The Arizona Supreme Court reviewed these findings and agreed with the sentencing court. Landrigan, 176 Ariz. at 6, 859 P.2d at 116.

"The presence of aggravating circumstances serves the purpose of limiting the class of death-eligible defendants, and the Eighth Amendment does not require that these aggravating circumstances be further refined or weighed by {the sentencing authority]." Blystone v. Pennsylvania, 494 U.S. 299, 306-07 (1990). Not only does Arizona's sentencing scheme generally narrow the class of death-eligible persons, §§ 13-703(F)(2) and (5) do so specifically.[13] Arizona's sentencing scheme is thus not contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court. The Court therefore will deny Petitioner's request for relief regarding this aspect of his Eleventh Claim for Relief.

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12. M.E. of 10/25/90 at 4. At the presentence hearing, the sentencing court misspoke, erroneously substituting §§ 13-703(F)(3) & (4) for § 13-703(F)(5). R.T. of 10/25/90 at 25. However, the sentencing court applied the proper standard as set forth in § 13-703(F)(5) in issuing sentence.

13. Petitioner does not argue that § 13-703(F)(2) or (5) apply to every defendant convicted of murder.

Petitioner also claims the Arizona death penalty statutes fail to provide for meaningful proportionality review and are thus unconstitutional. Petitioner raises this same argument in his Thirteenth Claim for Relief, and the Court will therefore address the merits of this claim in the context of the Thirteenth Claim for Relief.

### C. Arbitrary and Irrational Nature of Mandatory Death Sentence

Petitioner claims that the mandatory imposition of the death penalty where the court finds there are aggravating factors and no mitigating factors sufficient to warrant leniency results "in an arbitrary and irrational death sentence." Petitioner cites no cases or other legal authority in furtherance of this position. Petitioner's contention was expressly rejected in the plurality opinion in Walton, 497 U.S. at 651-652 (citing Blystone v. Pennsylvania, 494 U.S. 299 (1990) (death sentence imposed only after determination that aggravating factors outweigh mitigating factors, or there are no mitigating factors, held constitutional). The Court will thus deny Petitioner's request for relief as to this aspect of Petitioner's Eleventh Claim for Relief.

### D. Cruel and Unusual Punishment

For a variety of reasons, Petitioner claims that the death penalty constitutes cruel and unusual punishment. Pursuant to Gregg v. Georgia, 428 U.S. 153, 169 (1976), the Court rejects Petitioner's contention and will deny Petitioner's Eleventh Claim for Relief in its entirety.

**Claim 13:** **The death sentence imposed against Petitioner is inappropriate because he was denied the procedural safeguard of a meaningful proportionality review by the state appellate court. The limitation by the state court violated Petitioner's rights as guaranteed by the Eighth and Fourteenth Amendments.**

Petitioner claims that his death sentence is not proportional to similar homicide cases and that the denial of state appellate court proportionality review of his sentence was unconstitutional. Petitioner admits that there is no federal right to proportionality review where state law does not provide for such review. Pulley v. Harris, 465 U.S. 37, 43-45 (1984).

The Arizona Supreme Court did not conduct a proportionality review in this case. State v. Landrigan, 176 Ariz. 1, 8, 859 P.2d 111, 118 (1993). In State v. Salazar, 173 Ariz. 399, 416-417, 844 P.2d 566, 583-584 (1992), cert. denied, 509 U.S. 912 (1993), the Arizona Supreme Court held that proportionality reviews would no longer be conducted in death penalty cases. Thus, Petitioner had no constitutional right to proportionality review by the Arizona Supreme Court, and the Court will deny Petitioner's Thirteenth Claim for Relief.

**Claims 6, 10, and 13 --- Request for Evidentiary Hearing**

Petitioner has requested an evidentiary hearing be held on his Sixth, Tenth, and Thirteenth Claims for Relief. Pursuant to Rule 8 of the Rules Governing Section 2254 Cases in the United States District Court, the Court must determine whether an evidentiary hearing is required. "If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require." Rule 8(a).

An evidentiary hearing can be either mandatory or discretionary. "A habeas petitioner is entitled to an evidentiary hearing on a claim if (1) the petitioner's allegations, if proved, would entitle him to relief, and (2) the state court trier of fact has not, after a full and fair hearing, reliably found the relevant facts." Hendricks v. Vasquez, 974 F.2d 1099, 1103 (9th Cir. 1992) (internal quotes omitted), cert. denied, 517 U.S. 1111 (1996); Correll v. Stewart, 137 F.3d 1404, 1411 (9th Cir.), cert. denied, ___ U.S. ___, 119 S.Ct. 450 (1998) (colorable claim of ineffective assistance of counsel required); Totten v. Merkle, 137 F.3d 1172, 1176 (9th Cir. 1998) ("In habeas

proceedings, an evidentiary hearing is required when the petitioner's allegations, if proven, would establish the right to relief."). "[A]n evidentiary hearing is not required on issues that can be resolved by reference to the state court record[,]" Totten, 137 F.3d at 1176, or if the claim "presents a purely legal question." Hendricks, 974 F.2d at 1103.

In Townsend v. Sain, 372 U.S. 293, 313 (1963), the Supreme Court established six circumstances under which there is presumptively no "full and fair hearing" at the state level:

> (1) the merits of a material factual dispute were not resolved in a state court hearing;
>
> (2) the state factual determination is not fairly supported by the record as a whole;
>
> (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing;
>
> (4) there is a substantial allegation of newly discovered evidence;
>
> (5) the material facts were not adequately developed at the state court hearing; or
>
> (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

The Townsend decision was subsequently overruled in part by Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992), in which the Court held that if the failure to develop a material fact is attributable to the petitioner, a federal evidentiary hearing is required only upon a showing of cause and prejudice.

The Tamayo-Reyes Court did not alter the discretionary power of district courts to hold evidentiary hearings. See Seidel v. Merkle,

146 F.3d 750, 754 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S.Ct. 850 (1999); Pagan v. Keane, 984 F.2d 61, 64 (2d Cir. 1993). Nor does it appear that the AEDPA altered that part of Townsend not overruled in Tamayo-Reyes. Rather, the AEDPA simply provides further limitations on a district court's discretion to hold an evidentiary hearing where "the applicant has failed to develop the factual basis of a claim in State court proceedings." 28 U.S.C. § 2254(e)(2). The AEDPA does not preclude an evidentiary hearing where the failure to develop the facts is not attributable to the petitioner. Jones v. Wood, 114 F.3d 1002, 1013 (9th Cir. 1997) (court dismissed restraint petition without hearing); see also Lawrie v. Snyder, 9 F.Supp.2d 428 (D. Del. 1998), certification den'd, 176 F.3d 472 (3d Cir.), cert. denied, ___ U.S. ___, 119 S.Ct. 1493 (1999). (AEDPA superseded Tamayo-Reyes but left intact remainder of Townsend). Therefore, in deciding whether a hearing is mandatory, this Court needs to consider the Townsend "full and fair hearing" standard as well as the limitations set forth in § 2254(e)(2).

**A. Sixth Claim for Relief (Ineffective Assistance of Counsel)**

Petitioner requests that an evidentiary hearing be held so that he can offer testimony from his trial counsel and from another attorney to demonstrate that Petitioner's trial counsel's conduct was deficient under the first prong of Strickland. Petitioner also states he would offer expert testimony regarding Petitioner's organic brain dysfunction, neurobiological dysfunction, and competency to assist with his defense.

The expert testimony Petitioner hopes to develop relating to Petitioner's organic brain dysfunction and incompetency at the time of sentencing cannot be properly considered by this Court. Petitioner failed to raise allegations of organic brain dysfunction or incompetency at sentencing in any of his state court pleadings or in his Amended Petition for Habeas Corpus Relief. In addition, he has failed to demonstrate cause and prejudice for his failure to raise these allegations in state court, and he has failed to show that a fundamental

miscarriage of justice will occur if the Court does not review these allegations. Thus, these allegations are procedurally barred from review on the merits. Vasquez v. Hillery, 474 U.S. 254, 260 (1986); see Discussion supra at 9.

No evidentiary hearing was held on the merits of this claim in the state court, although Petitioner requested an evidentiary hearing on more than one occassion [sic]. State v. Landrigan, 176 Ariz. at 8, 859 P.2d at 118 ("no hearing occurred because [Landrigan] moved to dismiss his petition for post-conviction relief")[14]; R.O.A., Photostated Instruments, Item 137 at 17 (request for evidentiary hearing in subsequent petition for post-conviction relief); M.E. of 7/17/95 (Rule 32 court did not grant request for evidentiary hearing); R.O.A., Photostated Instruments, Item 144 at 20 (renewed request for evidentiary hearing to Arizona Supreme Court). Thus, any failure to develop the material facts of Petitioner's claim of ineffective assistance of counsel is not attributable to Petitioner, and 28 U.S.C. § 2254(e)(2) does not prevent the Court from exercising its discretion and granting Petitioner an evidentiary hearing on his Sixth Claim For Relief. Accord Jones v. Wood, 114 F.3d at 1012-13.

The Court finds, however, that Petitioner has not set forth a colorable claim of ineffective assistance of counsel because there is no prejudice. Even if his allegations were proven that his counsel rendered deficient performance by failing to discover and present mitigation evidence, Petitioner would not be entitled to relief. The evidence Petitioner claims his counsel should have discovered and presented to the sentencing court would not have led the sentencing court to "[conclude] that the balance of aggravating and mitigating circumstances did not warrant death." See Strickland, 466 U.S. at

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14. Petitioner filed two separate petitions for post-conviction relief in the Rule 32 court. The first was filed on July 23, 1991, and Petitioner moved to dismiss it without prejudice on November 1, 1991. (R.O.A., Photostated Instruments, Items 102 & 109). The Rule 32 court dismissed the first petition without prejudice on November 21, 1991. (M.E. 11/21/91). The second petition was filed on January 31, 1995. (R.O.A., Photostated Instruments, Item 137).

695. The Court will therefore deny Petitioner's request for an evidentiary hearing on Claim 6.

**B. Tenth Claim for Relief (Victim Impact Evidence)**

The Court finds that an evidentiary hearing is not required for Petitioner's Tenth Claim for Relief (Victim Impact Evidence). The evidence which Petitioner seeks to develop is evidence that the sentencing judge impermissibly considered victim impact evidence in imposing sentence. This presents a purely legal question. The presumption that the sentencing judge correctly applied the law and considered only admissible evidence governs. Walton, 497 U.S. at 653; see also Gretzler, 112 F.3d at 1009.

**C. Thirteenth Claim for Relief (Proportionality Review)**

The Court finds that an evidentiary hearing is not required for Petitioner's Thirteenth Claim for Relief (Proportionality Review). Petitioner was not entitled to proportionality review as a matter of law. Pulley, 465 U.S. at 43-45.

**Claims 6, 10, and 13 --- Request for Discovery**

Petitioner has requested discovery on his Sixth, Tenth, and Thirteenth Claims for Relief. Discovery in habeas corpus cases is governed by Rule 6 of the Rules Governing Section 2254 Cases in the United States District Court, which provides in pertinent part:

> (a) Leave of court required. A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.

"A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." Bracy v. Gramley, 520 U.S. 899, 904 (1997). "[W]here specific allegations

before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the courts to provide the necessary facilities and procedures for an adequate inquiry." Harris v. Nelson, 394 U.S. 286, 300 (1969).

**A. Sixth Claim for Relief (Ineffective Assistance of Counsel)**

The Court finds that Petitioner is not entitled to additional discovery on his Sixth Claim for Relief (Ineffective Assistance of Counsel). Petitioner has requested that he be allowed to obtain testimony from the Maricopa County Public Defender relating to the funding policies of the Public Defender's Office in 1989 and 1990. The Court finds that while such evidence may be relevant to Petitioner's claim that his counsel rendered deficient performance, the Court has determined that Petitioner was not prejudiced by his counsel's alleged failures. Thus, the additional discovery Petitioner seeks will not advance his Sixth Claim for Relief.

**B. Tenth Claim for Relief (Victim Impact Statements)**

The Court finds that Petitioner is not entitled to discovery on his Tenth Claim for Relief. Petitioner has requested that he be allowed to take the deposition of Judge Hendricks, the sentencing judge, regarding her recollection of the victim impact testimony. Petitioner has failed to demonstrate good cause to support such discovery. Moreover, "It is a firmly established rule that a judge may not be asked to testify about his mental processes in reaching a judicial decision." Thompson v. Crawford, 656 F.Supp. 1183, 1184 (S.D.Fla. 1987); see also Washington v. Strickland, 693 F.2d 1243, 1263 (5th Cir. 1982), rev'd on other grounds, 466 U.S. 668 (1984); Perkins v. LeCureux, 58 F.3d 214, 220 (6th Cir.), cert. denied, 516 U.S. 992 (1995).

### C. Thirteenth Claim for Relief (Proportionality Review)

The Court finds that Petitioner is not entitled to discovery on his Thirteenth Claim for Relief. Petitioner has requested that he be allowed to obtain copies of sentencing opinions, memoranda, and minute entries in which other Arizona Superior Courts stated a factual basis for not imposing a sentence of death. Since Petitioner is not entitled to proportionality review as a matter of law, the Court finds that such evidence will not advance Petitioner's Thirteenth Claim for Relief.

## CONCLUSION

Petitioner has failed to establish that he is entitled to habeas relief on any of his claims. The Court will therefore deny his requests for additional discovery and for an evidentiary hearing. The Court will also deny Petitioner's request for a writ of habeas corpus and will lift the stay of execution entered on November 4, 1996.

**IT IS HEREBY ORDERED** that Petitioner's request for an evidentiary hearing and his request for additional discovery are **DENIED**.

**IT IS FURTHER ORDERED** that Petitioner's First Amended Petition for Writ of Habeas Corpus (File doc. 30) is **DENIED WITH PREJUDICE**. The Clerk of Court shall enter judgment accordingly.

**IT IS FURTHER ORDERED** that the stay of execution entered by this Court on November 4, 1996 is **VACATED**.

**IT IS FURTHER ORDERED** that the Clerk of Court forward a copy of this Order to the Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix, AZ 85007-3329.

DATED this __14____ day of __December_____, 1999.

/s/
Roslyn O. Silver
United States District Judge

Copies to all counsel of record.

APPENDIX D

IN THE SUPERIOR COURT OF THE STATE
OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

| | | |
|---|---|---|
| STATE OF ARIZONA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | No. CR 90-00066 |
| vs. | ) | No. CR 90-0323-AP |
| | ) | |
| JEFFREY TIMOTHY LANDRIGAN, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

Phoenix, Arizona
October 25, 1990

BEFORE: The Honorable CHERYL K. HENDRIX

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Copy
Prepared for Appeal

By: Pauline Wood
Official Court Reporter

APPEARANCES:

On behalf of the State: Mr. Jeffrey W. Sandler
Deputy County Attorney

On behalf of the Defendant: Mr. Dennis M. Farrell
Deputy Public Defender

* * * *

October 25, 1990

THE COURT: Continuation of 703 hearing. CR 90-00066, State of Arizona against Jeffrey T. Landrigan.

MR. SANDLER: Jeff Sandler appearing on behalf of the State.

MR. FARRELL: Dennis Farrell on behalf of the defendant, who is present in custody, Your Honor.

THE COURT: Mr. Farrell, who may proceed.

MR. FARRELL: Your Honor, at this time -- I had, as the Court is aware, already filed a sentencing memorandum concerning a number of mitigating factors for the Court to consider concerning my client before sentencing. I have two witnesses that I wished to testify before this Court, one I had brought in from out of state and is my client's ex-wife, Ms. Sandy Landrigan. The second witness is my client's natural mother, Virginia Gipson. I believe both of those people had some important evidence that I believed the Court should take into mitigation concerning my client. However, Mr. Landrigan has made it clear to me -- Jeffrey, the defendant -- that he does not wish anyone from his family to testify on his behalf today.

I have talked with Sandra Landrigan, his ex-wife. I have talked a number of times with her and confirmed what I thought was important evidence that she should present for the Court. And I have

also talked with Ms. Gipson, and her evidence I think is very important and should have been brought to this Court's attention. Both of them, after talking with Jeff today, have agreed with their, in one case son and the other ex-husband, they will not testify in his behalf.

THE COURT: Why not?

MR. FARRELL: Basically it's at my client's wishes, Your Honor. I told him that in order to effectively represent him, especially concerning the fact that the State is seeking the death penalty, any and all mitigating factors, I was under a duty to disclose those factors to this Court for consideration regarding the sentencing. He is adamant he does not want any testimony from his family, specifically these two people that I have here, his mother, under subpoena, and as well as having flown in his ex-wife.

I have advised him and I have advised him very strongly that I think it's very much against his interests to take that particular position. I have also advised both the witnesses I could have them sworn in and ask them questions, but they are under an obligation to do what they feel is right, Your Honor. They are looking after Jeff's interests.

I'm coming from the position that I have to bring certain evidence before this Court. I'm at a loss. I don't know what this Court wishes to do.

THE COURT: Mr. Landrigan, have you instructed your lawyer that you do not wish for him to bring any mitigating circumstances to my attention?

THE DEFENDANT: Yeah.

THE COURT: Do you know what that means?

THE DEFENDANT: Yeah.

THE COURT: Mr. Landrigan, are there mitigating circumstances I should be aware of?

THE DEFENDANT: Not as far as I'm concerned.

THE COURT: I believe we should proceed if the witnesses are willing to testify.

MR. FARRELL: Your Honor, both witnesses have advised me they do not wish to and will not testify. If the Court wishes, we can ask each of them.

THE COURT: We will find out.

Where is Ms. Sandy Landrigan?

MS. LANDRIGAN: Right here.

THE COURT: Ms. Landrigan, will you testify today?

MS. LANDRIGAN: No, ma'am.

THE COURT: Why not?

MS. LANDRIGAN: I just wish not to.

THE COURT: Are you doing so at the instruction of Mr. Landrigan?

MS. LANDRIGAN: Yes, my ex-husband.

THE COURT: Has he asked you not to testify because you feel -- or he feels it's in his best interests?

MS. LANDRIGAN: No. I figure it's his life going on here. If he wants me not to, I don't want to.

THE COURT: Do you have mitigating circumstances that you would tell me about?

MS. LANDRIGAN: Just our past marriage.

MR. FARRELL: Your Honor, I don't know if Sandy Landrigan is aware what may be mitigating factors.

THE COURT: Anything and everything is a mitigating factor.

MR. FARRELL: I have talked with her over the phone concerning her past relationship with Jeff as well as the State's allegation of prior conviction concerning murder, and I believe that information is very relevant to this Court since she was a witness, and I believe and I think there are a number of mitigating factors she can present to the Court on Mr. Landrigan's behalf.

THE COURT: And, Mr. Farrell, what would those be?

MR. FARRELL: Your Honor, I believe one of the factors that, if the Court wishes me, what I consider --

THE COURT: Mr. Farrell, I want you -- I assume you have spoken with the witnesses that you intended to call, is that correct?

MR. FARRELL: Yes, Your Honor. I would be more than happy to relate to this Court what I expected to elicit in testimony from each of them.

THE COURT: I would appreciate that.

MR. FARRELL: From Sandy Landrigan, her relationship with Jeff, where she met him, in Texas, it was basically a place where people had substance abuse problems, in order to take care of their problems. As I pointed out in my memorandum, I believe my client has a substantial past history of substance abuse. That can be verified by Ms. Landrigan's testimony.

The fact that, after meeting him, they proceeded -- they were living in Texas and they proceeded to move back to Arizona and subsequently married and had a child together. My client took care of her and -- her two children. She had a prior child before they got married. I think she had a child prior to their marriage that was eight months old that basically Jeffrey raised as well as his own child that they raised. And I think she would be able to provide this Court with information concerning what type of a father and spouse he was, that he was a responsible person and loving, caring husband.

THE COURT: Was he employed during that period of time from time to time?

MR. FARRELL: Yes, he was.

THE COURT: Doing what?

MF. FARRELL: He was working, I believe, at a golf course during the year-and-a-half prior to the incident which occurred where he was convicted in Oklahoma of murder. And we went into great detail about the murder he was convicted of, and I think that's also a mitigating factor for the Court to consider. If the Court wishes, I could go into the details about what she told me about that situation also.

THE COURT: If you would, please, Mr. Farrell.

THE DEFENDANT: Isn't this just hearsay, what is going on here? If I wanted this to be heard, I'd have my wife say it.

THE COURT: Mr. Landrigan, I have a responsibility to see that your constitutional rights are protected.

THE DEFENDANT: I'm sitting here listening, Your Honor, to what he said and there's quite a few things he's said so far that he's got wrong.

THE COURT: Would you like to correct them?

THE DEFENDANT: Well, I wasn't just working. I was doing robberies supporting my family. We wasn't married. We wasn't married in Arizona. We lived in Oklahoma. I mean, you know, he's not getting the story straight. Why have him tell somebody else's story in the first fucking place?

THE COURT: Because I think it's important.

THE DEFENDANT: Well, he can sit here and make up anything he wants because he's sure not telling it like it is.

THE COURT: He is an officer of the Court, Mr. Landrigan, and he is ethically obligated to only make truthful avowals to the Court. If he makes anything other than truthful avowals to the Court, he can lose his license to practice law.

Continue, Mr. Farrell.

MR. FARRELL: Your Honor, additionally I talked with Sandra Landrigan about the situation of how Jeff was involved in murder in Oklahoma. And it appears from what she told me that she was expecting their child, she was in her eighth month of pregnancy, and there was a certain Greg Brown, who was a friend, a very close friend of my client, Jeffrey Landrigan. And Greg Brown was going to be the godfather of their new baby.

And they went over to his trailer one night because they had not seen him for a while and to get together with him, just basically celebrating the fact that Jeff was having a baby and Greg was to be the godfather. And Jeffrey and his wife Sandy and some other people went over to Greg Brown's trailer and they proceeded to drink that night. At least Jeffrey and Greg Brown, and I don't know who else was drinking. I think there was a quite a bit of drinking. Sandy says that she was not drinking. She remembers everything quite clearly. And they were doing quarters, which was, I believe, flipping quarters

into a shot glass and if they made it the other people had to drink the shot of whiskey.

And to make a long story short, by the end of the night everyone was quite inebriated. For whatever reason, words were spoken between Jeff and this Greg Brown. Something offensive came out of some innocent remark that one of them made. For whatever reason, an argument started. And Jeff -- I'm sorry -- Greg Brown was a much larger person than Jeffrey. And he picked up Jeff and threw him against the inside of the trailer. Sandy got in between them and said: Listen, you two guys are friends, you are best friends, you grew up together, you haven't seen each other in a while, calm down. You are both drinking. Let's leave and you guys can clear up whatever this argument is about, words that were spoken, tomorrow.

And they did. Jeff started walking out of the trailer. And from what I understand, Greg Brown pushed Sandy aside, ran up to Jeff after getting him outside the trailer and again grabbed him, pushed him, threw him up against the trailer and was going to punch him out.

Jeff happened to have a belt, and on the belt he was carrying a knife, which you could in Oklahoma. And Jeff had been drinking and at this particular time he was defending himself and he stabbed his friend one time. Unfortunately, he stabbed him through the chest into the heart. Sandy testified at the trial.

My client was convicted of first degree murder, and on appeal, from what I understand, the verdict was thrown out because they said it wasn't premeditated, and he pled guilty to second degree.

I think that's another mitigating factor concerning the scenario of how he got convicted of murder.

She also advised me concerning the conviction of his aggravated assault in prison. And the aggravated assault occurred -- here she wasn't really clear, and all I can do is give the Court

synopsis -- that there was someone in the same prison as Jeff that was a friend of Greg Brown's, and Greg Brown's father particularly, and he took offense that Jeff had killed Greg Brown and he was threatening him and Jeff defended himself and ended up stabbing this other person. And that was the conviction concerning an aggravated assault that the State has alleged.

THE COURT: Is there any other testimony you think that Ms. Landrigan would give to the Court if she decided to testify?

THE DEFENDANT: See, also, Your Honor, there's a few things he got wrong here again. I'd like to clear them up.

THE COURT: Please do, Mr. Landrigan.

THE DEFENDANT: When we left the trailer, Greg went out of the trailer first. My wife was between us. I pulled my knife out, then I was the one who pushed her aside and jumped him and stabbed him. He didn't grab me. I stabbed him.

THE COURT: Is there anything else you would like to clarify at this point, Mr. Landrigan?

THE DEFENDANT: Yeah, something else that was just said about the guy that was in prison. That wasn't Greg Brown's dad's friend or nothing like that. It was a guy I got in an argument with. I stabbed him 14 times. It was lucky he lived. But two weeks later they found him hung in his cell. He was dead. It wasn't nothing like it was presented.

THE COURT: Is there anything else you would like to clear up?

THE DEFENDANT: Not so far.

THE COURT: Mr. Farrell, are there any other circumstances you think Ms. Landrigan might testify to?

MR. FARRELL: Any other mitigating factors that I'd like presented to the Court?

THE COURT: Yes.

MR. FARRELL: Well, I was going to have his mother testify, and she --

THE COURT: No, my question referred only to Ms. Landrigan.

MR. FARRELL: Concerning Sandy Landrigan, no, Your Honor. That would be about the crux of her testimony.

THE COURT: I understand Ms. Gipson is here.

Ms. Gipson, would you like to come testify?

MS. GIPSON: No.

THE COURT: Is there anything you wish to say about your son?

MS. GIPSON: No.

THE COURT: Mr. Farrell, if Ms. Gipson were called to testify, what do you believe her testimony would be?

MR. FARRELL: Your Honor, I have talked with Ms. Gipson a number of times and she advised me about the factors that I was going to ask her concerning my client would basically -- since she didn't raise him, would be the fact that during her pregnancy what, if any, factors could possibly have affected her pregnancy. And she advises me that she and her husband, Jeffrey's natural father, were both drug users prior to her pregnancy, she was a drug user during her pregnancy, and I believe she used drugs after her pregnancy. The times and the extent I was going to bring out today, because I believe that there is some evidence that has been presented to the Court in the past concerning the possible effect on an infant when the mother takes

drugs and their particular susceptibility to drugs and their antisocial behavior resulting because of their dependency on drugs when they were -- during the period of gestation when they were being carried in their mother's body.

And I wish to establish that as a mitigating factor and, if sufficient, I was going to, after getting that testimony, I was considering asking for a recess to determine if I could substantiate the testimony that I had here today from other experts that may be available. It is a relatively new area that I'm not really familiar with. I have talked with some attorneys in the Phoenix area as well as the Tucson area concerning this type of mitigation, concerning the effect on an unborn infant when their mother is dependent on drugs and the resulting effect on the infant, neurological effect as well as any antisocial behavior. I believe there are some qualified experts in that area. Once I was able to ascertain what particular types of substances Ms. Gipson had been on, the duration, and getting some foundation, I would be able to have those particular experts come in and have the Court consider their testimony in that area.

THE COURT: Were you going to call any psychological experts such as Dr. Tatro?

MR. FARRELL: That was one name that was brought up, Your Honor. There's also -- I have been in contact with the -- I believe it's Arizona Capital Representation people and they have provided me with a number of other experts. But before I could talk with those experts about any specifics, I would have to find out what particular drugs might have been used and how long a period of time.

THE COURT: Mr. Farrell, my question was not addressed to typing up Ms. Gipson's drug use during pregnancy to the defendant's current psychological condition. My question simply was would you consider -- have you considered whether or not a psychological evaluation should be done on your client?

MR. FARRELL: I have considered it, yes.

THE COURT: All right. And have you had sufficient time to have such expert examine your client?

MR. FARRELL: Yes, I have, Your Honor.

THE COURT: And would you have a psychiatrist or psychologist standing in the wings to testify today?

MR. FARRELL: I could have, Your Honor.

THE COURT: Did you choose to, to present mitigating circumstances?

MR. FARRELL: Your Honor, at this time I do not have the information I thought necessary for those experts to testify based on the fact Ms. Gipson had not presented any specifics for me. And I thought that was really -- I understood there may be a problem and if she was not able to testify then I had no specifics for these people.

THE COURT: All right.

I have received a note indicating the jury in the Estrada case has reached a verdict. We will take the jury's verdict before we proceed in this case.

(A recess was had.)

THE COURT: All necessary and appropriate parties have now returned in CR 90-00066, State of Arizona against Jeffrey Landrigan.

Mr. Farrell, given the opportunity, would there be any other mitigating circumstances you would bring to the Court's attention?

MR. FARRELL: No, Your Honor. I do have some comments to make at the time of sentencing, but those would be the factors I'd represent to this Court in the testimony of the two witnesses that I have here today.

THE COURT: All right.

Mr. Sandler, is there any argument you wish to make?

MR. SANDLER: Your Honor, I do wish to, but before I make my argument there's a motion for new trial and a couple of constitutional challenges to the Arizona death penalty statute which have not been ruled upon.

THE COURT: Mr. Sandler, make your argument as to anything and everything at this point in time.

MR. SANDLER: As to the motion for new trial, Your Honor, I filed a response to that motion setting forth my position, as well as to the constitutional challenges.

As to sentence, Your Honor, I also filed a sentencing memorandum outlining what I believe to be the aggravating circumstances. I'd like to clarify my position on the cruel, heinous and depraved aspects.

Dr. Walker could not tell us whether or not the victim was unconscious at the time the ligature was placed around his neck. It is our position that if he were unconscious at that time the cruelty aspect would not apply. However, the heinous and depraved aspect could come into play showing the senselessness of the murder in that the defendant could have accomplished his objective of theft without killing Mr. Dyer, if he were unconscious at the time. It's our position that this is a cruel offense as defined by the statute.

The defendant's history shows a total disregard for human life, shows a total absence of remorse for this crime. We believe the only way to protect society is to impose the ultimate penalty of death, and we would ask you to do so.

THE COURT: Mr. Farrell?

MR. FARRELL: Yes, Your Honor.

Concerning all my motions for new trial and constitutionality, I would not reiterate all my arguments that are contained in my motion, but merely rely on those.

I also have provided the Court with a number of factors for the Court to consider in two sentencing memorandums. And without elaborating on each one of the factors that I consider mitigating in this particular instance, I would like to point out a couple of other factors for the Court to consider concerning possible mitigation.

One of the issues is, as this Court is aware, the State had offered to my client two different pleas prior to trial, neither of which contemplated the death penalty. And I would merely point out again for the Court that there was a parameter of sentencing that this Court could have sentenced my client to with either one of those pleas. But my client decided to exercise his constitutional right to a jury trial. And now that my client exercised that right, the State is speaking to penalize him by seeking the death penalty. I believe that that shows that justice, as far as the State is concerned, would have been accomplished prior to trial by some period of time of incarceration, and I don't think that any factors have been presented to this Court that were not -- the State was not aware of prior to trial. Consequently, I think the State's position of the death penalty is unwarranted.

There was one other issue concerning pecuniary gain. The Court heard all the testimony at trial. I don't believe that there was any testimony that anything was stolen from the victim's apartment. It was the State's contention there was a check that was stolen. They had some evidence the victim might have cashed that check himself. It was the State's contention some articles of clothing might have been taken, but there was evidence that that clothing, the shirt in particular, might have been given to Jeffrey Landrigan. As far as pecuniary gain, Your Honor, I don't think any of that was proven at trial.

Outside of the issues that I presented here today and the ones contained in my sentencing memorandum as well as the memorandum concerning constitutionality as far as the death penalty, I have nothing further to add at this time.

THE COURT: Mr. Sandler, anything further?

MR. SANDLER: No.

THE COURT: Based upon the jury verdict returned on June 28 of 1990, it is the judgment of this Court that the defendant is guilty in Count I of burglary, second degree, a class 3 felony, in violation of A.R.S. Section 13-1507, 1501, 701, 702, 801 and 812; in Count II, that the defendant is guilty of theft, a class 1 misdemeanor, committed in violation of A.R.S. Section 13-1801, 1802, 707 and 802; and in Count III, of murder, first degree, concerning the death of Chester Dean Dyer as a class 1 felony, in violation of A.R.S. Section 13-1105, 1101, and 703. Regarding all of these offenses, statutory references to A.R.S. Section 13-301, 302, 303 and 304 also apply. All of these offenses were committed on December 13th of 1989 in Maricopa County.

The jury has also found these offenses are repetitive offenses pursuant to A.R.S. Section 13-604(B), the defendant having previously been convicted of assault and battery with a deadly weapon on March 21st of 1986 in Pittsburgh County, Oklahoma, in CR F-85-116, and the defendant having previously been convicted of second degree murder on September 5th of 1985 in Washington County, Oklahoma in Cause No. F-82-228, and possession of marijuana on February 11th of 1981 in Washington County, Oklahoma in Cause No. F-80-338.

In reviewing the file I also found that the allegation of dangerousness had been alleged.

Mr. Sandler, at some point during the trial did we dismiss that allegation?

MR. SANDLER: Your Honor, I think we ended up concluding it did not apply to the offenses that were the burglary and theft counts.

THE COURT: All right. In the event I never formally dismissed it, at this time it is ordered dismissing the allegation of dangerousness.

Mr. Farrell, is there anything else you wish to say on behalf of your client?

MR. FARRELL: Nothing, Your Honor.

THE COURT: Mr. Landrigan, is there anything you wish to say in your own behalf at this time?

THE DEFENDANT: Yeah. I'd like to point out a few things about how I feel about the way this shit, this whole scenario went down. I think that it's pretty fucking ridiculous to let a fagot be the one to determine my fate, about how they come across in his defense, about I was supposedly fucking this dude. This never happened. I think the whole thing stinks. I think if you want to give me the death penalty, just bring it right on. I'm ready for it.

THE COURT: Is there anything else you would like to say in your own behalf, Mr. Landrigan?

THE DEFENDANT: I think that about covered it.

THE COURT: Anything further on behalf of the State?

MR. SANDLER: No.

THE COURT: Is there any legal cause why sentence should not now be pronounced?

MR. FARRELL: No. No legal cause, Your Honor.

THE COURT: With no legal cause appearing, it is ordered denying the motion for new trial.

The defendant has also filed a response to the State's sentencing memorandum which included some constitutional challenges to A.R.S. Section 13-703. I believe all of those challenges have been addressed in Jeffrey Allen Walton against the State of Arizona and Lewis against Jeffers, both cases having been decided by the United States Supreme Court this year. The United States Supreme Court has decided those issues against the position argued by the defendant.

The defendant has also argued that death by lethal gas is cruel and unusual punishment. This argument was rejected in Gray against Lucas, 710 Fed.2d 1048.

Presentence hearings have been conducted on various and sundry issues and have been reflected in the record. The State and defendant have presented evidence and argument concerning the existence and nonexistence of aggravating and mitigating circumstances. Both parties have been given the opportunity to present any relevant evidence of mitigation.

Based upon the evidence presented at trial, the evidence received at the sentencing hearing and arguments of counsel, the Court hereby renders the following special verdict:

The State originally listed A.R.S. Section 13-703 (F) (1), (2) and (5) as aggravating circumstances in its notice filed on February 27th of 1990. In the sentencing memorandum the State has alleged and has presented evidence as to aggravating circumstances (F) (2), (5) and (6). They are as follows: The defendant was previously convicted of a felony involving the use or threat of violence on another person, specifically murder second degree and assault and battery with a deadly weapon; commission of the offense for the receipt or in expectation of the receipt of anything of pecuniary value;

and commission of the offense in an especially heinous, cruel or depraved manner.

Therefore, the Court finds the State has not alleged or proven the existence of aggravating circumstances under A.R.S. Section 13-703 (F)(1), (3), (4), (7), (8), (9) and (10).

As to A.R.S. Section 13-703, subparagraph (F)(2), the jury found that the defendant has previously been convicted of felonies involving the use or threat of violence on another person, specifically murder in the second degree and assault and battery with a deadly weapon. The pen packet from the State of Oklahoma, Exhibit No. 86, shows that the offense of assault and battery with a deadly weapon involved the use of violence on another person. Specifically, the defendant used a knife-like object known as a shank to cut, slash and stab Ronnie Cartwright in the arms and central chest area between the rib cage and sternum, inflicting serious and grievous wounds. Additionally, the offense of murder in the second degree involves the use of violence upon another person. Therefore, the State has proven beyond a reasonable doubt that the defendant has previously been convicted of a felony involving the use or threat of violence on another person.

As to Element No. 703 (F)(3), the jury also found the defendant guilty of burglary and theft. The evidence presented at trial shows that the victim's apartment was ransacked. It clearly appeared from the photographs admitted into evidence that the individual who perpetrated the offense was looking for something. It does not make any difference whether or not they received or found anything of value and made off with it. The element of (F)(3) or (F)(4) is demonstrated as long as there was an expectation that something of value be received. The evidence has demonstrated that. Therefore, the Court finds the State has proven beyond a reasonable doubt that the defendant procured the commission of the offense with the expectation of receiving something of pecuniary value -- excuse me -- he committed the offense with the expectation that he would receive something of pecuniary value.

The State has alleged that subsection (6) also applies in that the defendant committed the offense in an especially heinous, cruel or depraved manner. The element of cruelty relates to the pain, mental anguish and physical abuse or distress experienced by the victim before death. Mental anguish includes a victim's uncertainty as to his ultimate fate. Cruelty is present as aggravating circumstances if it is reasonable to conclude there was terror and horror present in the victim's mind. If mental anguish is foreseeable after inflicting the mortal blow, then cruelty exists. The State must show beyond a reasonable doubt that the victim was conscious when acts of violence causing the death were committed. The evidence in this case is that the victim was probably not conscious when he was strangled. And therefore, the Court finds the State has not proven beyond a reasonable doubt that the defendant committed the offense in an especially cruel manner.

The elements of heinousness and depravity focus on the murderer's state of mind, the mental state and the attitude of the perpetrator as reflected in words and actions. There are five elements used to describe what is heinous and depraved: The apparent relishing of the murder by the killer evidencing debasement or perversion, indifference to the suffering of the victim evidencing a sense of pleasure which the defendant took in the killing; the infliction of gratuitous violence on the victim beyond that necessary to kill; the needless mutilation of the victim; the senselessness of the crime; and the helplessness of the victim. There is no evidence of relishing or gratuitous violence and there was no needless mutilation. And the last two elements alone, the senselessness of the crime and the helplessness of the victim, standing alone do not establish that the crime was especially heinous or depraved.

The law also states that the elements of heinousness and depravity can be found if the offense was committed to prevent the victim from testifying against the defendant concerning a felony that occurred contemporaneously with the murder. The Court finds that, although perhaps circumstantial evidence might lead one to reach this result, it has not been proven beyond a reasonable doubt.

The defendant has not alleged the existence of mitigating circumstances under elements (G)(2), (3) or (4). Viewing all of the evidence presented, the Court finds they do not apply. There is no indication under subsection (G)(2) that the defendant was under unusual or substantial duress, although not such as to constitute a defense to prosecution.

The defendant has not alleged mitigation under element (G) 93). The defendant was legally accountable for the conduct of another under the provisions of A.R.S. Section 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

Mitigation has not been alleged under element (G)(4) that the defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause a grave risk of causing death to another person, or under (G)(5), the defendant's age.

The defendant's state of intoxication has been alleged as a mitigating circumstances under element (G)(1), that the defendant's capacity to appreciate the wrongfulness of his conduct and his ability to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution. In the sentencing memorandum it is argued that evidence was presented at trial that the defendant drank quite a bit, smoked marijuana and did drugs. I do not recall any testimony about drinking or drug use. I do recall some evidence regarding the use of marijuana. However, no evidence has been presented to show that the apparent use of marijuana affected the defendant's capacity to appreciate the wrongfulness of his conduct or impaired his ability to conform his conduct to the requirements of law. Additionally, drug or alcohol intoxication, in and of itself, is not a mitigating circumstance.

The defendant has offered the following nonstatutory factors in mitigation: A difficult family history. The background and

emotional character of a defendant, while not making the defendant unable to commit a crime, is a factor that may be considered in mitigation. A difficult family background, in and of itself, however, is not a mitigating circumstance. I have received very little information concerning the defendant's difficult family history. I did find at age 17 the defendant denied any serious family problems and stated that most of his difficulties were of his own doing. The defendant described his father, who was a geologist, as a sober person who doesn't drink, who gives lots of love, he is not too strict, he is pretty lenient, with the only criticism being he was too easy to manipulate.

The defendant indicated that he resented his mother because she tried to dominate him. Perhaps that was because she was not easy to manipulate. And the defendant did express some concern that his mother had a drinking problem. However, the fact that one's mother may have had a drinking problem is not sufficient to be a mitigating circumstance.

The Court has also considered the evidence presented by way of avowals from Mr. Farrell here today concerning possible drug use by the defendant's natural mother during the defendant's (sic) pregnancy. I will assume for the purpose of these hearings that those are true statements. I'm also going to accept as true that which I have read in the newspaper, which is always dangerous, to the extent that when a mother uses drugs during pregnancy it affects the fetus and the person who results is more likely than not to have a similar drug addiction. However, even assuming all those things are true, there has been no showing that the defendant's proclivity or propensity toward drug use and drinking impaired his ability to understand or his capacity to appreciate the wrongfulness of his conduct and conform his conduct appropriately.

Love of one's family and love to one's family can be a mitigating circumstance. From the presence of Ms. Gipson alone and from Mr. Landrigan's ex-wife, I will assume that there are feelings

of love that have caused them to appear here today. And I do find that that does constitute a mitigating circumstance.

Another mitigating circumstance which has been alleged is the defendant's good conduct while in jail and good conduct in the courtroom. I believe it was Mr. Landrigan's intention today to take away the mitigating circumstance that, up until now, he had acted appropriately in the courtroom. I hope at least Mr. Landrigan has been able to release some of his frustration here today.

No evidence has been presented concerning the defendant's good conduct while in custody. And the Court must take note of the fact that while the defendant was in the custody of the Department of Corrections of the State of Oklahoma that he did escape. Therefore, I find conduct while in prison does not constitute a mitigating circumstance in this case.

It's also been alleged that there is no evidence of premeditation. The Court will take note that the jurors found in this case the defendant was guilty of felony murder. The Court will also take note however, that the theory of premeditation was not submitted to them. The Court does not know whether this murder was premeditated or not, but the Court will at least concede for the purpose of this hearing that there was no evidence of premeditation and will find that to be a mitigating circumstance.

Because the only theory of culpability the jury was instructed on in this case was felony murder or accomplice culpability, the Court must determine whether the defendant was the actual killer or only an accomplice. If the defendant was not the actual killer but only an accomplice to the felony that led to the killing or an accomplice to the act of killing, the Court may impose death only if it finds that the defendant attempted to kill -- or intended to kill or that the defendant was a major participant in the act which led to the killing and the defendant exhibited a reckless indifference to human life. The Court finds from the evidence introduced at trial, the evidence at the sentencing hearing and the entire case, and with particular regard the

Court would point to the testimony of Cheryl Smith that she had a conversation with the defendant when he indicated that he murdered someone, the Court finds that the defendant was the actual killer, that he intended to kill the victim and was a major participant in the act. Although the evidence shows that another person may have been present, the Court finds that the blood spatters on the tennis shoes of the defendant demonstrate that he was the killer in this case.

After weighing and considering the aggravating circumstances that the defendant had two prior felony convictions involving the use of violence on another person and committed the offense with the expectation of pecuniary gain, and considering the mitigating circumstances of love of family, love of his family for him -- I believe I found one other mitigating circumstance.

Mr. Farrell, could you refresh my recollection?

MR. FARRELL: I believe the Court has advised that since there was no premeditation --

THE COURT: -- and no premeditation -- thank you very much -- existed.

After weighing and considering these, I find that the mitigating circumstances do not outweigh the aggravating circumstances.

I'm also required to consider the nature of the person and the nature of the offense involved. I find the nature of the murder in this case is really not out of the ordinary when one considers first degree murder, but I do find that Mr. Landrigan appears to be somewhat of an exceptional human being. It appears that Mr. Landrigan is a person who has no scruples and no regard for human life and human beings and the right to live and enjoy life to the best of their ability, whatever their chosen lifestyle might be. Mr. Landrigan appears to be an amoral person.

Therefore, it is the judgment of this Court that as to Count I, with the aggravating circumstances being three prior felony convictions and no mitigating circumstances, it is the judgment of this Court that the defendant shall be imprisoned with the Department of Corrections for the aggravated term of 20 years. And the defendant is given credit for 294 days of presentence incarceration.

On Count II the defendant is sentenced to serve six months in the Maricopa County Jail. The defendant is entitled to credit for 294 days. Therefore, the defendant has served his sentence on that charge.

On Count III, it is the judgment of this Court that the defendant shall be sentenced to death with the Department of Corrections.

The defendant must pay, pursuant to A.R.S. Section 13-812, $200 to the Victims Compensation Fund for Counts I and III.

The sentences on Counts I and III shall be concurrent with each other, but consecutive to the sentence imposed in Cause No. F-82-228, murder in the second degree out of the district court of the 11th Judicial District, Washington County, Oklahoma.

Mr. Landrigan, as to Counts I and II, if you wish to appeal you must file your notice of appeal within 20 days. As to Count III, there will be an automatic notice of appeal of this case to the appropriate appellate court.

You do have the right to appeal from the judgment of this Court and to have a lawyer represent you. If you cannot afford a lawyer, one will be appointed. If you cannot afford the necessary records and transcripts, they will be provided to you free of charge. If you want to appeal, you must do so within 20 days from today's date as to Counts I and II. An automatic notice of appeal will be filed as to Count III. You will be required to file a notice of appeal.

We stand at recess.

(The proceedings were concluded.)

APPENDIX E

JAN J. RAVEN
P.O. Box 710
Phoenix, Arizona 85001
(602) 840-9118
State Bar Attorney No. 011676
ATTORNEY FOR PETITIONER

**IN THE SUPERIOR COURT OF MARICOPA COUNTY, ARIZONA**

| | | |
|---|---|---|
| STATE OF ARIZONA, | ) | |
| | ) | |
| Respondent, | ) | No. CR 90-00066 |
| | ) | |
| v. | ) | AFFIDAVIT |
| | ) | |
| JEFFREY T. LANDRIGAN, | ) | Hon. Cheryl K. Hendrix |
| | ) | |
| Petitioner. | ) | |
| | ) | |
| STATE OF ARIZONA | ) | |
| | ) | ss. |
| COUNTY OF PINAL | ) | |

JEFFREY T. LANDRIGAN, being first duly sworn, upon his oath, deposes and says:

1. That he is the Petitioner in the above-entitled case.

2. That his biological father is Darrel Wayne Hill, his biological mother is Letha Virginia Hill (now Gibson), and that these biological parents lived together during Ms. Gibson's pregnancy with Petitioner and for a period of time after his birth.

3. That Petitioner's biological father, Darrel Wayne Hill, was on death row in the state of Arkansas at the time of Petitioner's conviction and sentence.

4. That Petitioner learned of and had contact with Darrel Wayne Hill only after he was incarcerated following his conviction in the state of Oklahome [sic] for murder in the first degree.

5. That Petitioner advised his trial counsel of the facts stated above.

6. That on information and belief, Petitioner advises that Mr. Hill was available to confirm the foregoing facts and to confirm Ms. Gibson's alcohol and drug use during her pregnancy.

7. That Petitioner is aware of a family history of violence including the foregoing, and including Petitioner's biological grandfather, biological brother, and biological child.

8. That despite the foregoing trial counsel did not discuss with Petitioner, nor to his knowledge consider presenting testimony regarding the biological component of violence, as mitigation evidence at sentencing.

9. That had trial counsel raised this aspect of mitigation evidence with him, Petitioner would have cooperated in presenting that evidence and, on information and belief, Mr. Darrel Hill would also have cooperated.

Further, affiant saith not.

/s/
JEFFREY T. LANDRIGAN
Affiant

SUBSCRIBED AND SWORN TO before me this _24__ day of _JAN____, 1995.

19 June 1997 _____/s/_____
My Commission Expires Notary Public

APPENDIX F

FILED
JUL 20 '95
Clerk of the Court

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CLERK OF THE COURT

July 17, 1995 JUDGE CHERYL K. HENDRIX
E. Schneider
Deputy

No. CR 90-00066

STATE OF ARIZONA

Attorney General
by: Joseph J. Maziarz

v.

JEFFREY TIMOTHY LANDRIGAN

Jan J. Raven

Jeffrey Timothy Landrigan
#82157
ASPC-Florence
P.O. Box 629
Florence, AZ 85232

Criminal Court Admin.

Appeals

Victim Witness Division

A Petition for Post-Conviction Relief was filed on January 31, 1995. A response was filed on February 23, 1995. No reply has been received.

## A. DEATH QUALIFYING THE JURY

Petitioner contends the court erred in "death qualifying" the jury and that such conduct violates his constitutional rights under the Sixth and Fourteen Amendments. This is an issue that should have been raised on appeal. Under Rule 32.2(a)(3) of the Arizona Rules of Criminal Procedure, a defendant is precluded from relief based upon any ground waived on appeal. Although the Supreme Court has disapproved the "kitchen sink" approach in appellate briefs, it has suggested brevity, especially when raising frivolous issues. State v. West, 176 Ariz. 432 at 439, 862 P.2d 192 (1993).

Notwithstanding preclusion, defendant's claim is without merit.

> Because defendant did not object when these jurors were excused and affirmatively passed the jury panel at the close of voir dire, he is precluded from challenging the jurors on appeal. Id.

In State v. West, Id., the Supreme Court quotes from State v. Martinez-Villareal, 145 Ariz. 441, 449, 702 P.2d 670, 678, *cert. denied*, 474 U.S. 975, 106 S. Ct. 339, 88 L. Ed. 2d 324 (1985):

> [J]ury questioning regarding capital punishment is permissible where the questioning determines bias of a nature which would prevent a juror from performing his duty . . . . [V]oir dire questioning related to a juror's views on capital punishment is permitted to determine whether those views would prevent or substantially impair the performance of the juror's duties to decide the case in accordance with the court's instructions and the juror's oath.

The questions asked, as quoted in the petition, were to determine whether the prospective jurors had opinions which would prevent them from fairly and impartially considering the evidence. The questions asked were proper.

**B. NEWLY DISCOVERED EVIDENCE.**

Petitioner claims there is newly discovered evidence. That newly discovered evidence is evidence that the victim's last pay check was never cashed. This is not newly discovered evidence. The State's Response to the Motion for Judgment of Acquittal or Motion for New Trial recites "The State has received information that the check was never cashed." The fact that the check was not cashed was made known to the defendant in July of 1990.

Count II of the indictment charges defendant with theft of the payroll check and clothing. The fact that the check was never cashed does not mean the defendant did not take the check. The theft count does not evaporate if it is subsequently discovered the check was still in the victim's apartment (which has not been alleged as newly discovered evidence). The defendant was also charged with theft of clothing. The evidence remains unrefuted and uncontradicted defendant had in his possession some of the victim's clothing.

Defendant is not entitled to relief on the basis of newly discovered evidence, Rule 32.1(e) of the Arizona Rules of Criminal Produced, [sic] because the fact would not have changed the verdict or the sentence.

**C. INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.**

1. Petitioner claims counsel was ineffective at sentencing because defendant's biological father and his adopted sister were not contacted by his attorney and counsel "failed to explore additional grounds for arguing mitigation evidence."

To present a viable claim of ineffective assistance of counsel, the defendant must establish counsel's conduct fell below an objective standard of prevailing professional norms and there is a reasonable probability that the result would be different. Strickland v. Washington, 466 U.S. 668 (1984).

Since defendant instructed his attorney not to present any evidence at the sentencing hearing, it is difficult to comprehend how defendant can claim counsel should have presented other evidence at sentencing.

> THE COURT: Mr. Landrigan, have you instructed your lawyer that you do not wish for him to bring any mitigating circumstances to my attention?
>
> THE DEFENDANT: Yeah.
>
> * * *
>
> THE COURT: Mr. Landrigan, are there mitigating circumstances I should be aware of?
>
> THE DEFENDANT: Not as far as I'm concerned.

Since the defendant instructed his attorney not to bring any mitigation to the attention of the court, he cannot now claim counsel was ineffective because he did not "explore additional grounds for arguing mitigation evidence".

Defendant now seeks to avoid the stance he assumed at trial by stating that if counsel had sought to provide evidence of a family history of violence defendant "would have cooperated". Affidavit of Jeffrey T. Landrigan. Again, the defendant's statements at sentencing belie his new-found sense of cooperation. The defendant said he told his attorney not to present any mitigating evidence.

Notwithstanding the frivolous nature of the claim, defendant is precluded from relief on the basis of ineffective assistance of counsel at sentencing. A defendant is precluded from relief on any ground finally adjudicated on appeal. Rule 32.2(a)(2). Although the Supreme Court usually does not entertain claims of ineffective assistance of counsel unless the matter has first been addressed by the trial court, it departed from its customary procedure because it "determine[d] from the record that the ineffective assistance claim is meritless." State v. Landrigan, 176 Ariz. 1 at 8, 859 P.2d 111 (1993).

**D. CONSIDERATION OF PRESENTENCE REPORT CONTAINING FAMILY RECOMMENDATION OF DEATH SENTENCE.**

Petitioner asserts err occurred when the court considered the presentence report which contained statements of the defendant's family.

This is an issue which should be raised on appeal. The defendant cannot be granted relief based upon any ground waived on appeal. Rule 32.2 (a)(3) of the Arizona Rules of Criminal Procedure. Notwithstanding preclusion, the claim is without merit. It is assumed the trial court considers only relevant information and disregards anything irrelevant or inflammatory from victims in the presentence report. State v. Michael Apelt, 176 Ariz. 349, 359, 861 P.2d 634 (1993). Defendant has not shown that the statements of the victim's family were considered by the trial court. Defendant has failed to show prejudice.

**E. DEATH PENALTY IS UNCONSTITUTIONAL.**

Petitioner asserts the death penalty is unconstitutional for several reasons. If the defendant was serious about having these issues properly addressed, they should have been raised on appeal. Because they were not raised, they were waived and the defendant is

precluded from being granted relief. The defendant probably did not raise the issues on appeal because they are without merit.

1. Defendant claims the death penalty is unconstitutional because the county attorney has discretion to decide whether to seek the death penalty.

The existence of discretion does not affect the validity of defendant's sentence. State v. Michael Apelt, 176 Ariz. 349 at 359, 861 P.2d 634 (1993); McCleskey v. Kemp, 481 U.S. 279, 296-97, 107 S. Ct. 1756, 1769-70, 95 L.Ed.2d 262 (1987); State v. West, 176 Ariz. 432, 454, 862 P.2d 192 (1993); State v.White, 168 Ariz. 500, 515, 815 P.2d 869, 884 (1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1199, 117 L.Ed. 2d 439 (1992); State v. Rossi, 146 Ariz. 359, 366, 706 P.2d 371, 378 (1985).

2. The statute is unconstitutional because it does not require the State to prove the death penalty is "appropriate."

The defendant is mistaken in asserting that the statute does not require a determination of "appropriateness". The State has the burden to prove aggravating factors beyond a reasonable doubt. If the State has met that burden, both the trial court and the Supreme Court determine the appropriateness of the penalty. State v. Gillies, 135 Ariz. 500, 511, 662 P.2d 1007, 1018 (1983); State v. LaGrand, 153 Ariz. 21, 34, 734 P.2d 563, 576 (1987); State v. White, 168 Ariz. 500, 510, 815 P.2d 869, 879 (1991) *cert. denied*, ___ U.S. ___, 112 S.Ct. 1199, 117 L.Ed.2d 439 (1992).

3. The statute precludes weighing all mitigation evidence and places the burden of proving mitigation on the defendant.

The court believes defendant misconstrues the statute to reach the conclusion that the statute precludes weighing all of the mitigation evidence. Although a defendant must prove mitigating circumstances by a preponderance of the evidence, State v. Greenway, 170 Ariz. 155 at 168, 823 P.2d 22 at 35 (1991), the judge must consider "any

aspect of the defendant's character or record and any circumstance of the offense relevant to determining whether the death penalty should be imposed," State v. Kiles, 175 Ariz. 358 at 373, 857 P.2d 1212 at 1227, and must consider all evidence offered in mitigation. State v. Ramirez, 178 Ariz. 116, 131, 871 P.2d 237, 252, *cert. denied*, 115 S.Ct. 435 (1994). Requiring the defendant to prove mitigating circumstances by a preponderance of the evidence is constitutional. Walton v. Arizona, 497 U.S. 639, 649-51, 110 S.Ct. 3047, 3054-55 (1990).

4. The bias and prejudice of the sentencer cannot be voir dired.

This argument has been raised and rejected in State v. West, supra, State v. Stanley, 167 Ariz. 519 at 527, 809 P.2d 944 at 952 (1991); State v. Rossi, 154 Ariz. 245, 247-48, 741 P.2d 1223, 1225-26 (1987).

5. The death penalty is cruel and unusual punishment.

The death penalty is not cruel and unusual punishment if it is not imposed in an arbitrary and capricious manner. Gregg v. Georgia, 428 U.S. 153, 195, 96 S.Ct. 2909, 2935-36 (1976); State v. Blazak, 131 Ariz. 598, 601, 643 P.2d 694, 697, *cert. denied*, 459 U.S. 882, 103 S.Ct. 184 (1982).

6. A proportionality review is constitutionally required.

Defendant concedes that the law is to the contrary. State v. Salazar, 173 Ariz. 399, 416-17, 844 P.2d 566, 583-84 (1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 3017, 125 L.Ed. 2d 707 (1993). It is petitioner's contention that this decision must be reconsidered. It is not the function of the lowly trial court to reconsider decisions of the lofty Supreme Court.

The court finds there are no genuine material issues of fact or law in dispute and that future proceedings would not serve any useful purpose.

IT IS ORDERED dismissing the petition.